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Supreme Court of the United States

OCTOBER TERM, 1959

No. 297

GREAT NORTHERN RAILWAY COMPANY,
A CORPORATION, APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FILED AUGUST 10, 1959
PROBABLE JURISDICTION NOTED OCTOBER 19, 1959

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[fol. 4] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-59 Civ. 5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed January 12, 1959

Comes Now the plaintiff above named, and brings this suit to enjoin, annul, suspend and set aside the order of Division 2 of the Interstate Commerce Commission issued July 14, 1958, and the order of the Interstate Commerce Commission affirming the order of Division 2 issued on December 1, 1958, in a proceeding entitled, "Docket No. 32015, Preston-Shaffer Milling Company v. Great Northern Railway Company et al.," and for cause of action against defendants alleges:

I.

The plaintiff, Great Northern Railway Company, is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, with its principal office at St. Paul, Minnesota, and is a common carrier by railroad of persons and property in interstate, foreign and intrastate commerce in the States of Wisconsin, Iowa, Minnesota, North and South Dakota, Montana, Idaho, Washington, Oregon and California.

II.

The Interstate Commerce Commission is an agency of the United States, established by law and vested with authority over the operations and rates of the plaintiff as a [fol. 5] common carrier by railroad pursuant to the provisions of the Interstate Commerce Act, as amended (Title 49, U. S. Code, § 1 et seq.).

III.

Jurisdiction of this Court over this cause of action is provided by Title 28, U. S. Code §§ 1336, 2284 and 2321-2325, inclusive, which authorizes suits to be brought in the District Court of the United States against the United States of America to enjoin, annul, suspend and set aside orders of the Commission. Venue of this action is in this Court pursuant to Title 28, U. S. Code § 1398, because of the fact that the principal office of the plaintiff, Great Northern Railway Company, is at 175 East Fourth Street, St. Paul 1, Minnesota. Plaintiff invokes the jurisdiction of this Honorable Court under the provisions of the foregoing statutes.

IV.

These proceedings originated with a complaint filed by the Preston-Shaffer Milling Company with the Interstate Commerce Commission on June 19, 1956 under I.C.C. Docket No. 32015, naming as defendants Great Northern Railway Company, plaintiff herein, and Union Pacific Railroad Company, Southern Pacific Company (Pacific Lines), and Atchison, Topeka & Santa Fe Railway Company. The said complaint in Docket No. 32015 alleged that the combination rates applicable on wheat and wheat products in carloads from stations on Great Northern Railway Company in Montana to destinations in Oregon south of Portland, and in California on the Southern Pacific and the Atchison, Topeka & Santa Fe Railway Company, over the route of the Great Northern Railway Company to Spokane, Washington, Washington, the Union Pacific Railroad Company to Portland and connections beyond with transit at Waits-

burg, Milton-Freewater and Ayena, were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and unduly preferential and prejudicial [fol. 6] in violation of Section 3 of the Interstate Commerce Act. The said complaint prayed that the Commission prescribe just, reasonable and non-prejudicial joint rates for the future, and if necessary require the establishment of through routes under the provisions of Section 15(3) and (4) of the Interstate Commerce Act.

V.

The Interstate Commerce Commission set the said complaint for oral hearing and the same was held at Seattle, Washington on October 3rd and 4th, 1956 before Interstate Commerce Commission Examiner Edward L. Boisseree. The oral hearing was adjourned with the understanding that further evidence would be submitted by verified statements under the Commission's modified procedure, and subsequently the Great Northern Railway Company filed its verified statement with a due date of March 1, 1957, and complainant, Preston-Shaffer Milling Company filed its verified statement in reply with a due date of March 20, 1957.

Thereafter, the original complainant in Docket 32015, Preston-Shaffer Milling Company, sold its flour business and mill at Milton-Freewater, Oregon to Centennial Mills, Inc., and by agreement between the parties with the Commission's approval, Centennial Mills, Inc. was substituted as complainant in Docket No. 32015. Additional evidence pertaining to this change in ownership of Milton-Freewater Mill was submitted by supplemental verified statements of the parties, consisting of a supplemental statement submitted jointly by the original title complainant, Preston-Shaffer Milling Company, and Centennial Mills, Inc., with a due date of June 1, 1957, and a supplemental statement by the Great Northern Railway Company with a due date of June 15, 1957. Thereafter briefs were filed by substituted complainant, Centennial Mills, Inc., and defendant, Great Northern Railway Company, and a proposed report [fol. 7] was issued by Examiner Edward L. Boisseree of

the Interstate Commerce Commission finding the rates assailed in Docket No. 32015 not shown to be unreasonable or unduly prejudicial and finding the through routes and joint rates prayed for by the complaint not shown to be necessary or desirable in the public interest and recommending that the complaint should be dismissed. A true copy of the report proposed by Examiner Edward L. Boisseree is attached hereto and made a part hereof as "Complaint Appendix A."

Complainant, Centennial Mills, Inc., filed exceptions to the proposed report of the Examiner, to which defendant, Great Northern Railway Company, replied, and after oral argument before Division 2 of the Commission on April 30, 1958, the Commission by Division 2 entered its report and order dated July 14, 1958 reversing the Examiner and granting the relief sought by the complaint in Docket No. 32015. A true copy of Division 2's said report and order of July 14, 1958 is attached hereto and made a part hereof as "Complaint Appendix B."

Thereafter, and in accordance with rules of the Interstate Commerce Commission, defendant Great Northern Railway Company filed petition for reconsideration by the entire Commission and for oral argument, and complainant filed its reply thereto. On December 1, 1958 the Commission issued its order denying the Great Northern Railway Company's petition for reconsideration by the entire Commission and ordering that the order of the Commission by Division 2, dated July 14, 1958, be reinstated and modified so as to become effective on January 16, 1959 without change in the requirements of said order. A true copy of the Commission's said order of December 1, 1958 is attached hereto and made a part hereof as "Complaint Appendix C."

[fol. 8]

VI.

Plaintiff alleges that said orders of the Interstate Commerce Commission dated July 14, 1958 and December 1, 1958 are based upon errors of law and fact and are not supported by the evidence or adequate findings, exceed the statutory power of the Commission, and are unlawful,

arbitrary, null and void, and should be set aside for the following reasons:

(1) The Commission improperly construed Sections 3(1) and 15(3) of the Interstate Commerce Act to hold that the Commission may require the establishment of new through routes which substantially shorthaul a carrier without regard to the prohibition against shorthauling contained in Section 15(4) of the Interstate Commerce Act.

(2) The Commission acted arbitrarily, unreasonably and unlawfully in establishing the new through routes which substantially shorthaul the Great Northern Railway Company without making any findings under Section 15(4) of the Interstate Commerce Act.

(3) The Commission acted arbitrarily, unreasonably and unlawfully in failing to give consideration to the revenue loss which will be suffered by the Great Northern Railway Company through the establishment of the new through routes and joint rates applicable thereto required by its orders here assailed.

(4) There is no evidence in the record to support the Commission's finding that the prescribed new through routes and joint rates applicable thereto are "necessary or desirable in the public interest."

(5) There is no evidence in the record to support the Commission's finding that the lack of the prescribed new through routes and joint rates is and will be unduly prejudicial to the mill of Milton-Freewater, and unduly preferential of competing mills in violation of Section 3(1) of the Interstate Commerce Act.

[fol. 9] (6) The Commission acted arbitrarily, unreasonably and unlawfully in failing to give consideration to the fact that complainant, Centennial Mills, Inc., owns and operates, in addition to its Milton-Freewater Mill which represents only 18 per cent of complainant's total milling capacity, three other flour mills representing 82 per cent of complainant's total milling capacity, all of which are located on existing through routes and have available the joint rates prescribed for the Milton-Freewater Mill.

(7) The Commission's findings of fact, its conclusions based thereon, and its order requiring the establishment of the prescribed new through routes and joint rates applicable thereto, are contrary to and in violation of the provisions of Sections 15(3), 15(4) and 3(1) of the Interstate Commerce Act.

(8) The Commission acted arbitrarily, unreasonably and unlawfully in refusing to grant the petition for reconsideration of the order of the Commission, Division 2, dated July 14, 1958.

VII.

Plaintiff, Great Northern Railway Company, will be irreparably injured and damaged if the Interstate Commerce Commission's orders of July 14, 1958 and December 1, 1958 are not restrained, suspended, set aside and annulled. Plaintiff has no remedy at law to recover such loss or damage.

Wherefore, plaintiff prays:

1. That process may issue against the United States of America and Interstate Commerce Commission.

2. That this Court by a temporary stay, preliminary or interlocutory injunction, stay, restrain, and suspend the operation of the orders of the Interstate Commerce Commission dated July 14, 1958 and December 1, 1958 pending the final hearing and determination of this action.

[fol. 10] 3. That a Court, constituted as required by U.S. Code, Title 28, Secs. 2284, 2321-2325, inclusive, be convened, and that said Court so constituted and convened shall hear this petition upon due and legal notice to defendants.

4. That the Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside, and annulling said orders of the Commission.

5. That plaintiff have recovery of the defendants of the proper costs of this suit.

6. That plaintiff have such other and further relief in the premises as to equity may pertain and may be deemed by this Court fit and proper.

Dated at St. Paul, Minnesota, this 12th day of January, 1959.

Respectfully submitted,

Anthony Kane, L. E. Torinus, Curtis H. Berg, Robert F. Garing, Attorneys for Great Northern Railway Company, 175 East Fourth Street, St. Paul 1, Minnesota.

[fol. 48] Affidavit of Service (omitted in printing).

[fol. 49]. [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed January 12, 1959

(Set for hearing 9:30 A.M., Jan. 15, 1959 (Nordbye, J.))

Comes now the plaintiff in the above entitled cause and moves the Court to grant a temporary restraining order enjoining the United States of America and the Interstate Commerce Commission and their officers and agents from putting into effect and directing them to set aside and suspend the effective date of the orders of the Interstate Commerce Commission of July 14, 1958 and December 1, 1958, in the proceeding entitled "Docket No. 32015, Preston-Shaffer Milling Company v. Great Northern Railway Company et al.," until a hearing has been had and a determination made by the full three judge Court.

The Court has the authority to enter the order herein sought under Section 2284, U. S. Code (28 U. S. 2284).

The orders of the Interstate Commerce Commission require the plaintiff, Great Northern Railway Company, to establish, maintain and apply to the transportation of

wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern Railway Company east and south of Cutbank, Montana, including Cutbank, to points in Oregon south of Portland and to points in California on the lines of the Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company, over the routes of the Great Northern Railway Com- [fol. 50] pany to Spokane, Washington, Union Pacific Railroad Company to Portland, Oregon, with transit at Milton-Freewater, Oregon, thence the Southern Pacific Company (in connection with The Atchison, Topeka and Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes. The order of July 14, 1958 was stayed pending disposition of plaintiff's petition for reconsideration. The order of December 1, 1958, denied plaintiff's petition for reconsideration and reinstated the order of July 14, 1958 so as to become effective on January 16, 1959 without change in the requirements of said order. The effect of the assailed orders would be to establish new through routes and joint rates applicable thereto which will substantially shorthaul the plaintiff, resulting in substantial losses of revenue to plaintiff.

The plaintiff in its complaint has asserted errors of law and fact by the Interstate Commerce Commission in its conclusions of law and facts which were a basis for the assailed orders. If said orders are permitted to become effective, immediate, substantial and irreparable injury to plaintiff would result. As shown by the attached affidavit, plaintiff would suffer immediate and irreparable injury in that it would have no adequate remedy at law to recover the damages through revenue losses which it would incur as a result of the Commission's orders being permitted to become effective.

Plaintiff has filed its complaint with this Court praying that the Court by a temporary stay, preliminary or interlocutory injunction stay, restrain and suspend the operation of the orders of the Interstate Commerce Commission dated July 14, 1958 and December 1, 1958, pending the final hearing and determination of this action, and that upon final

[fol. 51] hearing the Court enter a decree permanently suspending, enjoining, setting aside, and annulling said orders of the Commission.

Wherefore, plaintiff moves that the Court enter an order temporarily restraining the defendants from putting into effect the Commission's orders of July 14, 1958 and December 1, 1958 pending final determination of the complaint herein.

Respectfully submitted,

Anthony Kane, L. E. Torinus, Curtis H. Berg, Robert F. Garing, Attorneys for Great Northern Railway Company, 175 East Fourth Street, St. Paul 1, Minnesota.

[fol. 52]

AFFIDAVIT OF ERNEST F. McGUIRE, IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

State of Washington,
County of King, ss.

Ernest F. McGuire, being first duly sworn on oath deposes and says that:

He is a resident of Mercer Island, Washington, and is now and continuously since May 1, 1956 has been General Freight Agent of the Great Northern Railway Company (hereinafter referred to as "Great Northern"), with his office at Seattle, Washington. The Great Northern is a party plaintiff in the above entitled proceeding and was a party defendant in the complaint brought by Preston-Shaffer Milling Company before the Interstate Commerce Commission in its Docket 32015.

He is familiar with the issues involved in the above entitled proceeding before this Court, and in the proceeding before the Interstate Commerce Commission entitled "Docket No. 32015, Preston-Shaffer Milling Company v. Great Northern Railway Company et al." and has prepared and presented exhibits and testimony on behalf of the defendant, Great Northern, in said Docket 32015.

He has investigated and studied the effect upon the Great Northern of the orders of the Interstate Commerce Commission in Docket 32015 dated July 14, 1958 and December 1, 1958. If the said orders should be permitted to become effective the Great Northern will be required to establish joint rates over new through routes that will substantially shorthaul the Great Northern without its consent, and result in a substantial loss of revenue to the Great Northern.

Under present routes the Great Northern now transports wheat and wheat products from the Montana origin territory involved in Docket 32015 over routes giving Great Northern its maximum haul, for as much as 74 per cent of [fol. 53] the distance to San Francisco, California, and 58 per cent of the distance to Los Angeles, California. On movements under present routes which give the Great Northern its smallest participation in the transportation, the Great Northern is the carrier for 54.1 per cent of the mileage to San Francisco, and 43.6 per cent of the mileage to Los Angeles, California. On the same hauls via the new through routes required to be established by the Commission's said orders in Docket 32015, the Great Northern's participation in the transportation to San Francisco would be only 28.6 per cent of the distance to San Francisco and only 23.3 per cent of the distance to Los Angeles. In terms of actual miles, the Great Northern would be shorthauled by 658.9 miles at the maximum, and 377.5 miles at the minimum to both San Francisco and Los Angeles via the new routes required to be established by the Commission's said orders as compared to the existing routes.

Such shorthauling would result in a corresponding revenue loss to the Great Northern. Based on studies and calculations presented to the Commission through affiant's testimony in Docket 32015, affiant has determined and verily believes that the Great Northern will suffer a minimum revenue loss of $1.35 per ton on traffic through the Milton-Freewater Mill of Centennial Mills, Inc. if the Great Northern is compelled to establish the new through routes and joint rates required by the Commission's said orders in Docket 32015. On the basis of the evidence of record showing the tonnage of Montana wheat processed by the

Milton-Freewater Mill and moved to California, this minimum revenue loss of $1.35 per ton produces a minimum annual loss to the Great Northern of $36,846.00.

The above estimated revenue losses of $1.35 per ton and $36,846.00 per year are the minimum losses which would be [fol. 54] suffered by the Great Northern, for if the Great Northern is compelled to establish the new through routes and joint rates with transit at Milton-Freewater, Oregon as ordered by the Commission, many other mills located on the lines of the Northern Pacific Railway Company and the Union Pacific Railroad Company will seek and obtain similar relief from the Commission, which will mean an additional revenue loss to the Great Northern. Affiant estimates such additional revenue loss, if this occurs, to exceed $115,000.00 per year, with a potential revenue loss of over $450,000.00 per year.

By its report and order in Docket 32015 dated July 14, 1958, Division 2 of the Interstate Commerce Commission found that,

> "... the loss to the Great Northern, measured by the difference between its share of the present joint rates from origins via Spokane to Portland and of its share of the joint through rates sought via Spokane to the California destinations, as computed above, would amount to $1.35 per ton."

If the order of the Commission dated December 1, 1958 affirming the order of Division 2 dated July 14, 1958, is permitted to become effective, the Great Northern will suffer irreparable injury due to the revenue losses which it will suffer as a result of being compelled by said orders to maintain and apply to the transportation of wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern east and south of Cutbank, Montana, including Cutbank, to points in Oregon south of Portland, and to points in California on the lines of the Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company, over the routes of the Great Northern to Spokane, Washington, Union Pacific Railroad Company to Portland, Oregon, with transit at Milton-

Freewater, Oregon, thence the Southern Pacific Company (in connection with the Atchison, Topeka & Santa Fe Rail [fol. 55] way Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other railroads.

The Great Northern would have no adequate remedy at law to recover the damages through revenue losses which it would incur as a result of the Commission's orders being permitted to become effective. Only by maintenance of the status quo pending a determination on appeal of this Court of the propriety of the Commission's order affirming the order of Division 2, will it be possible to avoid irreparable injury to the Great Northern if the Court should ultimately find that the Interstate Commerce Commission erred in compelling the Great Northern, without its consent, to establish the prescribed new through routes and joint rates applicable thereto which will substantially shorthaul the Great Northern. If this Court grants the motion for temporary restraining order herein sought, and ultimately determines that the report and orders of the Commission in Docket 32015 assailed in this proceeding are lawful, no damage whatever will have been incurred by any of the parties to the proceedings before the Interstate Commerce Commission in Docket 32015, or this proceeding, or the shipping public.

Ernest F. McGuire.

Subscribed and sworn to before me this 10th day of January, 1959.

Robert F. Garing, Notary Public in and for the State of Washington, residing at Seattle. My Commission Expires April 25, 1962.

(Notarial Seal)

[fol. 62] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

[Title omitted]

TEMPORARY RESTRAINING ORDER—January 15, 1959

The above-entitled matter came duly on before the Court on Thursday, January 15, 1959, at 9:30 A.M., on the application of plaintiff for a temporary restraining order. Plaintiff was represented by its counsel, L. E. Torinus and Robert F. Garing, and defendants United States of America and Interstate Commerce Commission were represented by Clifford Janes, Assistant United States Attorney. There were no other appearances. No objection was made to the granting of the motion.

It appearing that on January 12, 1959, the Interstate Commerce Commission and the complainant before the Interstate Commerce Commission in the proceeding hereinafter referred to were notified by wire, and the United States Attorney and the Attorney General of the United States have likewise been notified, of this hearing, the Court, having considered plaintiff's motion for a temporary restraining order, the matters alleged therein, the affidavit [fol. 63] attached thereto, the complaint on file herein, and the files and record in this proceeding, and being duly advised in the premises, hereby finds:

1. The Interstate Commerce Commission by Division 2 made its report and order in its Docket No. 32015, entitled "Preston-Shaffer Milling Company v. Great Northern Railway Company et al.," dated July 14, 1958, wherein the said Commission ordered the plaintiff herein, Great Northern Railway Company, to establish upon not less than thirty (30) days' notice to the Commission and to the public, and thereafter to maintain and apply to the transportation of wheat and wheat products, in carloads,

from points in Montana on the lines of the Great Northern Railway Company east and south of Cut Bank, Montana, including Cut Bank, Montana, to points in Oregon south of Portland and to points in California on the lines of the Southern Pacific Company and The Atchison, Topeka & Santa Fe Railway Company over the routes of the Great Northern Railway Company to Spokane, Union Pacific Railroad Company to Portland, Oregon, with transit at Milton-Freewater, Oregon, thence the Southern Pacific (in connection with The Atchison, Topeka & Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes. Said order dated July 14, 1958, was stayed pending disposition of a petition for reconsideration filed with said Commission subsequent to July 14, 1958. By order dated December 1, 1958, said Commission denied plaintiff's petition for reconsideration and modified said order of July 14, 1958, which had meanwhile been stayed [fol. 64] pending disposition of said petition, so as to become effective January 16, 1959, without change in the requirements of said order. On January 13, 1959, plaintiff received telegraphic advice from the Commission that said order had been further modified so as to become effective February 16, 1959.

2. The complaint of the plaintiff herein and the affidavit attached to said motion for a temporary restraining order raise substantial and serious question and issue as to the validity of the aforesaid order of July 14, 1958, as modified by said order of December 1, 1958, and as further modified.

3. In order to maintain the status quo and to prevent irreparable damage and injury to the plaintiff, and in order to permit this Court to grant effective relief if it should find upon final hearing and determination of this matter that the plaintiff is entitled to relief herein, it is essential that the operation and effective date of said order of the Interstate Commerce Commission dated July 14, 1958, as modified by said order of December 1, 1958, and as further modified, be restrained, suspended and enjoined tempo-

rarily and the effectiveness of said order as modified be suspended until this matter may be brought for determination before a three-judge Court as provided by statute.

4. This temporary restraining order is based upon the facts related in the affidavit of Ernest F. McGuire on file herein and on the facts stated in plaintiff's complaint and upon the circumstance that unless said temporary restraining order be granted, plaintiff will be required to establish [fol. 65] upon not less than thirty (30) days' notice, not later than February 16, 1959, new through routes and joint rates which will result in a minimum loss of revenue of $36,846.00 per year, which loss if sustained would be irretrievable.

5. A temporary restraining order restraining and enjoining the operation and effective date of said order of the Interstate Commerce Commission dated July 14, 1958, as modified by said order of December 1, 1958, and as further modified, will not injure the defendants herein, United States of America and Interstate Commerce Commission, or prejudice their interest or position in this proceeding.

Now, Therefore, It Is Ordered that the operation, application and effectiveness of the order of the Interstate Commerce Commission, by Division 2, dated July 14, 1958, as modified by said order of the Interstate Commerce Commission dated December 1, 1958, and as further modified, be, and they hereby are, stayed, suspended, restrained and enjoined, and the effective date thereof suspended until further hearing and order of this Court herein.

Dated this 15 day of January, 1959.

By the Court

Gunnar H. Nordbye, Chief Judge.

[fol. 69] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—January 17, 1959

The above named plaintiff having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction, enjoining, suspending, annulling and setting aside certain orders of the Interstate Commerce Commission, and said application for injunction having been presented to the Honorable Gunnar H. Nordbye, United States District Judge for the District of Minnesota, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It Is Now Here Ordered that Honorable Charles J. Vogel, United States Circuit Judge for the Eighth Circuit, and Honorable Edward J. Devitt, United States District Judge for the District of Minnesota, be and they hereby are designated to sit with the above named Honorable Gunnar H. Nordbye, United States District Judge for the District of Minnesota, to hear and determine said action and proceeding.

Dated this 17th day of January, A. D. 1959.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fol. 70] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

[Title omitted]

JOINT ANSWER OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION—Filed March 17, 1959

The United States of America and the Interstate Commerce Commission (hereinafter called the Commission), defendants, for their joint answer to the complaint:

I.

Admit the allegations contained in paragraphs I, II and III.

II.

As to paragraph IV, admit that Preston-Shaffer Milling Company, on the date alleged, filed a complaint with the Commission naming as defendants Great Northern Railway Company, plaintiff herein, (hereinafter called Great Northern) and Union Pacific Railroad Company, Southern Pacific Company (Pacific Lines), and Atchison, Topeka & Santa Fe Railway Company; that said complaint was assigned I.C.C. Docket No. 32015, but as to the particular allegations of said complaint these defendants respectfully refer to the complaint itself, which is a part of the record of the proceedings in said docket.

[fol. 71] III.

Admit paragraph V except that these defendants deny that the examiner made any findings but rather recommended that the rates should be found by the Commission not unreasonable and that the proposed joint rates should not be found to have been shown necessary, and that for a more accurate and complete statement of the

documents alluded to by said paragraph V respectfully refer the Court to the documents as contained in the record of the proceedings before the Commission.

IV.

Deny each and every and all allegations contained in paragraphs VI and VII.

V.

Except as they expressly admit certain allegations, these defendants deny each and every allegation contained in the complaint.

VI.

And further answering the complaint, these defendants deny that the actions of the Commission challenged herein are unlawful for the reasons specified in the complaint, or for any reason whatever, and aver that the action of the Commission complained of is supported by adequate findings, that its findings are supported by substantial evidence, that plaintiff has had a full and fair hearing, and that the Commission's determinations are in accordance with law.

[fol. 72] Wherefore, having fully answered, these defendants pray that the relief sought in the complaint be denied and that the complaint be dismissed.

Victor R. Hansen, Assistant Attorney General;
Fallon Kelly, United States Attorney, District of Minnesota;
Charles R. Esherick, Attorney, Department of Justice, Washington 25, D. C.
Attorneys for the United States of America

Robert W. Ginnane, General Counsel;
Francis A. Silver, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.
Attorneys for the Interstate Commerce Commission

Certificate of Service (omitted in printing).

[fol. 73] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Action, No. 4239 Civ. 5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants.

CENTENNIAL MILLS, INC., Applicant for Intervention.

MOTION OF CENTENNIAL MILLS, INC. TO INTERVENE AS A DEFENDANT AND NOTICE OF MOTION—Filed March 18, 1959

Now comes Centennial Mills, Inc. and moves for leave to intervene as a defendant in this action, pursuant to the provisions of Title 28, U. S. Code, Sec. 2323, in order to assert the defenses set forth in its proposed Answer, of which a copy is hereto attached, on the ground that applicant is the party in whose favor the Interstate Commerce Commission made and entered the order sought to be annulled and set aside in this proceeding, and as such has a good defense to the complaint herein.

S. J. Wettrick, Attorney for Centennial Mills, Inc., Applicant for Intervention, Arctic Building, Seattle 4, Washington.

Notice of Motion (omitted in printing).

[fol. 74] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Action, No. 4 59 Civ. 5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants.

CENTENNIAL MILLS, INC., Applicant for Intervention.

ORDER AUTHORIZING INTERVENTION—March 18, 1959

This Matter came on for hearing on this 18th day of March, 1959, on the motion of Centennial Mills, Inc. for leave to intervene in the above entitled cause as a defendant, and it appearing to the Court that the order herein sought to be set aside and annulled was entered by the Interstate Commerce Commission in favor of the aforesaid applicant for intervention, and that under the statute it is entitled to intervene herein as of right, it is

Ordered that Centennial Mills, Inc. be and it is hereby authorized to intervene as a defendant and that its proposed Answer to the complaint herein be received and filed.

March 18th, 1959

Gunnar H. Nordbye, Chief Judge.

[fol. 75] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Action, No. 4 59 Civ. 5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants.

CENTENNIAL MILLS, INC., Intervening Defendant.

ANSWER OF CENTENNIAL MILLS, INC.—Filed March 18, 1959

Now comes Centennial Mills, Inc., as intervening defendant, and for answer to the complaint herein, avers, admits and denies as follows:

I.

Intervener is a corporation organized and existing under the laws of the State of Washington, having its principal place of business in the City of Seattle, State of Washington; that among other things, it is engaged in the purchase, storage, sale and distribution of grain, and in the manufacture, sale and distribution of grain products, including wheat flour; and that it owns and operates a flour mill and grain storage elevator at Milton-Freewater in the northeastern part of the State of Oregon.

II.

That the issue involved in this proceeding is whether intervener's mill at Milton-Freewater is entitled to the same joint rates for the transportation of wheat and its

products from points on the Great Northern Railway Company in Montana to points in Oregon south of Portland and in California as other mills in the Pacific Northwest and in Montana and Utah; that after full hearing the Commission found that the failure of the Great Northern to establish such rates for the mill at Milton-Freewater is and will be unduly prejudicial to said mill and unduly preferential of competing mills enjoying the joint rates, and ordered the establishment of the same joint rates for intervener's mill at Milton-Freewater; and that the purpose [fol. 76] of the complaint herein is to set aside said order of the Commission.

III.

Intervener admits the allegations contained in Paragraphs I, II and III of the complaint.

IV.

As to paragraph IV, intervener admits the allegations contained therein, but as to the particular allegations of the complaint respectfully refers to the complaint itself in I.C.C. Docket No. 32015.

V.

Intervener admits the allegations in paragraph V of the complaint, but alleges that the recommendations of the examiner therein referred to are immaterial in view of the fact that the Commission reached a conclusion contrary thereto.

VI.

Intervener denies each and every allegation contained in paragraph VI of the complaint, including the sub-paragraphs thereof.

With reference to sub-paragraph (3) thereof, intervener specifically alleges that the Great Northern will suffer very little if any loss of revenue through the establishment of the joint rates ordered by the Commission, but on the contrary that intervener will continue to suffer substantial damage unless and until

the joint rates are established on the same basis as those enjoyed by the mills of its competitors. Intervener further alleges that any loss of revenue by the Great Northern does not justify the maintenance of rates which are unduly prejudicial.

With reference to sub-paragraph (6) intervener specifically alleges that it is immaterial that it owns other mills which have available the joint rates and that the record shows that there are particular reasons why the mill at Milton-Freewater requires the joint rates in order that it may continue to carry on its busi- [fol. 77] ness in California; that there are numerous mills owned by competitors of intervener, which have the benefit of the joint rates, and that all of intervener's mills are entitled to the same rates as the mills of its competitors.

VII.

Intervener denies the allegations contained in paragraph VII of the complaint, and alleges that the order of the Commission will not subject the Great Northern to any legal damage or injury.

VIII.

Intervener further alleges generally that the facts set forth in the complaint are insufficient to constitute a cause of action or to entitle plaintiff to the relief prayed for, or to any relief whatever from this Court.

Wherefore, intervener prays that the complaint be dismissed and that the temporary restraining order heretofore issued be dissolved.

S. J. Wettrick, Attorney for intervener, Arctic Building, Seattle 4, Washington.

[fol. 78a]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

No. 4-59 Civil 5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants,

and

CENTENNIAL MILLS, INC., Intervening Defendants.

Excerpts From Hearing Before Three-Judge Court—April 7, 1959

The above entitled matter came on for hearing before a three-Judge Court consisting of Honorable Charles J. Vogel, United States Circuit Judge; Honorable Gunnar H. Nordbye, United States District Judge and Honorable Edward J. Devitt, United States District Judge, at Minneapolis, Minnesota on a hearing on action to set aside Order of the Interstate Commission, commencing at 10:00 o'clock A.M., April 7, 1959.

[fol. 78b] APPEARANCES:

L. E. Torinus, General Solicitor, St. Paul, Minnesota; Robert F. Garing, Assistant General Attorney, Seattle, Washington; Curtis H. Berg, Attorney, St. Paul, Minnesota, Attorneys for Plaintiff.

Hyam S. Segell, Assistant United States Attorney, St. Paul, Minnesota, Attorney for Defendant United States of America.

Francis A. Silver, Associate General Counsel, Interstate Commerce Commission, Washington, D. C., Attorney for Defendant Interstate Commerce Commission.

S. J. Wettrick, Seattle, Washington, Attorney for Intervening Defendant Centennial Mills, Inc.

[fol. 78c] Judge Vogel: This is the time set for argument in the case of Great Northern Railway Company against United States of America and Interstate Commerce Commission and Centennial Mills. I understand all preliminaries have been taken care of by Judge Nordbye; is that correct, gentlemen?

Mr. Garing: That's correct, sir.

•••

Judge Vogel: You may proceed now, Mr. Garing.

OFFERS IN EVIDENCE

Mr. Garing: Your Honor, I would like to offer in evidence the certified copies of the entire record in this proceeding before the Commission with the exception of the Great Northern's Answer to the Complaint which was the denial, and with the exception of the transcript of the oral argument before the Commission on Petition for Reconsideration. Other than those two items, I have here certified copies of all of the transcript of the hearing, the complaint, all of the supplemental verified statements filed by parties pursuant to the Commission's rules, the Examiner's report, the exceptions and briefs in support of exceptions, and the briefs filed by all of the parties in this case, together with all of the orders of the Commission in the case in Docket 32015 which is the subject of this proceeding before the Commission. This is the entire record, [fol. 78d] and I have talked this over with Mr. Silver and Mr. Wettrick, and I believe they are both also desirous that these documents be admitted.

Mr. Silver: We have no objection.

Judge Vogel: They may be received.

•••

Judge Vogel: This case is taken under advisement. The Court is now adjourned until 10:00 o'clock tomorrow morning.

(Whereupon the above entitled matter came to a close.)

•••

[fol. 79] [File endorsement omitted].

IN UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

4-59-Civ-5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants,

and

CENTENNIAL MILLS, INC., Intervening Defendant.

MEMORANDUM DECISION—May 15, 1959

Anthony Kane, General Counsel, Seattle, Wash., L. E. Torinus, General Solicitor, St. Paul, Minn., Robert F. Garing, Assistant General Attorney, Seattle, Wash., Curtis H. Berg, Attorney, Seattle, Wash., attorneys for plaintiff Great Northern Railway Company.

Victor R. Hansen, Assistant Attorney General, Washington, D.C., Fallon Kelly, United States Attorney, St. Paul, Minn., John H. D. Wigger, Attorney, Department of Justice, Washington, D.C., attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel, Francis A. Silver, Associate General Counsel, Interstate Commerce Commission, Washington, D.C., attorneys for defendant Interstate Commerce Commission.

S. J. Wettrick, Seattle, Wash., attorney for intervening defendant Centennial Mills, Inc.

Before Vogel, Circuit Judge, Nordbye, Chief Judge and Devitt, District Judge.

[fol. 80] DEVITT, *District Judge*:

This is an appeal from an order of the Interstate Commerce Commission establishing joint rates for the movement of wheat and wheat products from certain Montana points on the lines of the Great Northern Railway Company to points in Oregon, south of Portland, and to California. Statutory jurisdiction is established.

The issue was raised in 1956 by Preston-Shaffer Milling Company by the filing of a complaint with the Interstate Commerce Commission alleging that certain combination rates then in effect in the described area were unjust, unreasonable and unduly prejudicial to it and unduly preferential to its competitors on other routes over which the more advantageous joint rates applied, all in violation of Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. 3(1)), which, among other things, prohibits unreasonable prejudice and preference.

The matter was fully heard by a Hearing Examiner. The complainant, Preston-Shaffer, subsequently sold its mill at Milton-Freewater, Oregon, the place allegedly discriminated against by the Great Northern, to Centennial Mills, Inc., which company is an intervening defendant in this appeal.

The Hearing Examiner filed his report recommending dismissal of the complaint. Subsequently, on July 14, 1958, the Commission, Division 2, issued its report finding that the failure of the daintiff to establish joint rates on the described traffic from Montana to the Oregon and California points, with transit at the Milton-Freewater location, was unduly prejudicial to the complainant's mill there, and was unduly preferential of competitor's mills located on routes over which joint rates did apply. The Commission also ordered the establishment of joint rates [fol. 81] not in excess of the lowest joint rates then in effect over competing routes. 304 ICC 491 (1958).

On December 1, 1958, the entire Commission denied a petition for reconsideration of the order of its Division 2, and this appeal followed.

A short explanation of the issue in the light of the undisputed facts may be helpful.

For about the last ten years the mill at Milton-Freewater, Oregon, in the east-central section of the state, has been engaged principally in the milling of bread flour for California bakeries. This flour requires wheat with a high protein content. This type of wheat is grown principally in the central and north-central areas of Montana where hard spring wheat is raised in large volume. Approximately 79 percent of the wheat originating in these areas is produced at places adjacent to the lines of the Great Northern. The Milton-Freewater mill has, in recent years, obtained 90 percent or more of its wheat supply from locations served by the plaintiff.

There are several flour mills in the northwestern states engaged in milling flour from hard spring wheat for the California market. There are mills at Spokane and Tacoma in Washington, at Portland, Oregon, at Great Falls, Montana, Ogden, Utah and elsewhere. The business is highly competitive.

Wheat purchased by Centennial Mills is moved over the route of the Great Northern to Spokane, Washington, over the Union Pacific to Milton-Freewater, there processed into flour, and again carried by Union Pacific to Portland, Oregon. This entire movement is made under a joint rate, against which no objection is raised. But further movement of the shipment to points south of Portland and to California stations is made under the regularly applicable non-joint rate. The resulting combination rate between [fol. 82] Montana stations and points south of Portland and in California is appreciably higher than the joint rate now enjoyed by Centennial's competitors over different, but similar, routes to the same destinations.

To illustrate the alleged discrimination by figures from the Commission's report, the present joint rate available to competing mills on other lines from certain Montana points to San Francisco or Los Angeles is $1.18½ per 100 pounds, while the combination rate available to complainant's mill at Milton-Freewater is $1.49 to San Francisco and $1.77 to Los Angeles, or 30½ cents and 58½ cents higher than the joint rate. This is the discrimination against which Centennial complains and which the Commission held violated Section 3(1).

The Great Northern contends that there is no substantial evidence in the record to support the action of the Commission in ordering the joint rate, and that doing so and establishing a new through route will substantially short haul it in contravention of its right to the long haul secured by Section 15(4) of the Interstate Commerce Act (49 U.S.C.A. 15(4)).

In determining the issues before us, it is well to recall that the authority of the courts in reviewing the actions of administrative bodies is very limited. We are confined to determining whether there is warrant in the law and the facts for the Commission's action. That is the limit of our province. We cannot substitute our judgment for that of the Commission or challenge the wisdom of its action. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535, 536, 66 S.Ct. 687, 90 L.Ed. 821 (1946); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, 227, 228, 63 S.Ct. 589, 87 L.Ed. 724 (1943). For further recent expressions recognizing our circumscribed authority in this respect, see *Quickie Transport Co.* v. *United States*, [fol. 83] 169 F. Supp. 826 (D.C. Minn. 1959); *Minneapolis & St. Louis Ry. Co.* v. *United States*, 165 F. Supp. 893 (D.C. Minn. 1958); *Canadian Pacific Ry. Co.* v. *United States*, 158 F. Supp. 248 (D.C. Minn. 1958); *Schaffer Transportation Co.* v. *United States*, 139 F. Supp. 444, 448 (N.D.S.D. 1956), reversed on other grounds, 355 U.S. 83, 78 S.Ct. 173, 2 L.Ed. 2d 117 (1957).

We have reviewed the record and conclude that there is substantial evidence, considered as a whole, to support the Commission's finding and order.

From the summary of facts recited above and from other evidence in the record, the Commission could well find that complainant's mill at Milton-Freewater was in a disadvantageous competitive position because of the higher rate it was charged. The action of the Commission in concluding that the failure of the Great Northern to establish joint rates constituted undue prejudice to Centennial and undue preference to its competitors within the meaning of Section 3(1) of the Interstate Commerce Act is supported by the evidence and is not unreasonable.

We have examined each of the arguments advanced by Great Northern in support of its view that the evidence does not support the Commission's action, including its contention that no actual prejudice to Centennial has been shown, that Centennial has not lost business under the present combination rates, that by the continued use of "switch billing" any disadvantages could be minimized or obviated, and that Centennial is free to shift its California flour milling operations to one of its other mills where the joint rate is obtainable, and conclude that no purpose will be served by detailed discussions and observations about them. Suffice it to say that they do not convince us that the action of the Commission is unsupported [fol. 84] by proof.

Plaintiff also contends that Congress has guaranteed each rail carrier the right to the longest haul possible on its own lines and to the revenue thus obtainable, and that this order deprives it of the long haul and will result in substantial loss of revenue.

The long haul assurance is contained in Section 15(4) of the Interstate Commerce Act, set out in the footnote[1]

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[1] "In establishing any such through route the Commission shall not (*except as provided in section 3 of this title,*" and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion

[fol. 85] but, as will be observed by the italicized portion in the second line, the prohibition against short hauling does not apply to cases under Section 3 of the Act. The Commission took action here under Section 3.

In effect the Congress has permitted the Commission to short haul where undue prejudice or preference is established. *Baltimore & Ohio Ry. Co.* v. *United States*, 100 F. Supp. 1002 (S.D.N.Y. 1951).

The Great Northern states that as a result of the Commission's order it will suffer a minimum direct loss of $36,000.00 annually and a probable additional loss, through application of the lower joint rate to other mills, in excess of $115,000.00 per year. The Commission recognized this fact and made reference to it in its report 304 ICC at p. 497. But the fact that the order adversely affects the economic interests of the carrier is not grounds for denying the validity of it. *Seaboard Air Line Ry. Co.* v. *United States*, 131 F. Supp. 129 (E.D. Va. 1954) aff'd per curiam 349 U.S. 902, 75 S.Ct. 579, 99 L.Ed. 1239 (1955). The United States Supreme Court has observed that "self-interest of the carrier may not override the requirement of equality in rates." *United States* v. *Illinois Central Ry. Co.*, 263 U.S. 515, 524, 44 S.Ct. 189, 68 L.Ed. 417 (1923).

We have fully considered all of the arguments and contentions of the plaintiff and view them as being without merit. Our conclusion is that the Commission's order is based on adequate findings supported by substantial evidence in the record before it, and that the Commission properly exercised its authority under the law and that its action was not unreasonable, arbitrary, or capricious.

The plaintiff's complaint is dismissed and the temporary [fol. 86] restraining order is discharged. A stay of 30 days is granted.

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of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." [*Emphasis added]

Dated: May 15, 1959.

Charles J. Vogel, United States Circuit Judge; Gunnar H. Nordbye, United States District Judge; Edward J. Devitt, United States District Judge.

[fol. 88] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

[Title omitted]

PETITION FOR EXTENSION OF STAY AND FOR INJUNCTION PENDING APPEAL—Filed June 12, 1959

To the Honorable Judges of the District Court of the United States for the District of Minnesota:

The petitioner herein states to the court that it intends to perfect an appeal to the Supreme Court of the United States under Title 28, Section 1253, of United States Code Annotated from the final order made and filed herein on May 15, 1959, dismissing the complaint in this action, discharging the temporary restraining order made and filed herein on January 15, 1959, and granting a stay of thirty days.

Upon the files and records herein, including the affidavit of Ernest F. McGuire dated January 10, 1959, in support of petitioner's motion for a temporary restraining order (a copy of which affidavit is attached to this application for reference), pursuant to the provisions of Rule 62(c) [fol. 89] of the Rules of Civil Procedure, and upon the authority of *Merchants Warehouse Company* v. *United States*, 283 U.S. 501, and *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672, petitioner hereby applies for an injunction to be effective during the pendency of such appeal to the Supreme Court of the United States and until the further order of this court, said injunction suspending and re-

straining the enforcement of, and temporarily setting aside, the order of the Interstate Commerce Commission entered on July 14, 1958, as subsequently modified, in the proceeding entitled "No. 32015, Preston-Shaffer Milling Company v. Great Northern Railway Company Et Al."

Petitioner prays that there be called to hear and determine this petition a district court of three judges, of whom one shall be a circuit judge in accordance with the provisions of Rule 62(c) of the Federal Rules of Civil Procedure. Petitioner further prays the court to expedite the hearing of this application and to set the same down for hearing at the earliest practicable date, and, pending the hearing on this application, to extend and continue in effect the stay heretofore granted on May 15, 1959, and to grant to petitioner such other and further relief as to the court may seem just and proper in the premises.

Dated this 11th day of June, 1959.

Anthony Kane; Louis E. Torinus, Jr.; Curtis H. Berg; Elmer B. Trousdale; Attorneys for Petitioner, 1120 Great Northern Building, St. Paul 1, Minnesota.

[fol. 90] AFFIDAVIT OF ERNEST F. MCGUIRE IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

State of Washington,
County of King, ss.

Ernest F. McGuire, being first duly sworn on oath deposes and says that:

He is a resident of Mercer Island, Washington, and is now and continuously since May 1, 1956 has been General Freight Agent of the Great Northern Railway Company (hereinafter referred to as "Great Northern"), with his office at Seattle, Washington. The Great Northern is a party plaintiff in the above entitled proceeding and was a party defendant in the complaint brought by Preston-Shaffer Milling Company before the Interstate Commerce Commission in its Docket 32015.

He is familiar with the issues involved in the above entitled proceeding before this Court, and in the proceeding before the Interstate Commerce Commission entitled "Docket No. 32015, Preston-Shaffer Milling Company v. Great Northern Railway Company et al." and has prepared and presented exhibits and testimony on behalf of the defendant, Great Northern, in said Docket 32015.

He has investigated and studied the effect upon the Great Northern of the orders of the Interstate Commerce Commission in Docket 32015 dated July 14, 1958 and December 1, 1958. If the said orders should be permitted to become effective the Great Northern will be required to establish joint rates over new through routes that will substantially shorthaul the Great Northern without its consent, and result in a substantial loss of revenue to the Great Northern.

[fol. 91] Under present routes the Great Northern now transports wheat and wheat products from the Montana origin territory involved in Docket 32015 over routes giving Great Northern its maximum haul, for as much as 74 per cent of the distance to San Francisco, California, and 58 per cent of the distance to Los Angeles, California. On movements under present routes which give the Great Northern its smallest participation in the transportation, the Great Northern is the carrier for 54.1 per cent of the mileage to San Francisco, and 43.6 per cent of the mileage to Los Angeles, California. On the same hauls via the new through routes required to be established by the Commission's said orders in Docket 32015, the Great Northern's participation in the transportation to San Francisco would be only 28.6 per cent of the distance to San Francisco and only 23.3 per cent of the distance to Los Angeles. In terms of actual miles, the Great Northern would be short-hauled by 658.9 miles at the maximum, and 377.9 miles at the minimum to both San Francisco and Los Angeles via the new routes required to be established by the Commission's said orders as compared to the existing routes.

Such shorthauling would result in a corresponding revenue loss to the Great Northern. Based on studies and calculations presented to the Commission through affiant's testimony in Docket 32015, affiant has determined and verily believes that the Great Northern will suffer a minimum

revenue loss of $1.35 per ton on traffic through the Milton-Freewater Mill of Centennial Mills, Inc. if the Great Northern is compelled to establish the new through routes and joint rates required by the Commission's said orders in Docket 32015. On the basis of the evidence of record showing the tonnage of Montana wheat processed by the Milton-Freewater Mill and moved to California, this minimum revenue loss of $1.35 per ton produces a minimum annual loss to the Great Northern of $36,846.00.

[fol. 92]

The above estimated revenue losses of $1.35 per ton and $36,846.00 per year are the minimum losses which would be suffered by the Great Northern, for if the Great Northern is compelled to establish the new through routes and joint rates with transit at Milton-Freewater, Oregon as ordered by the Commission, many other mills located on the lines of the Northern Pacific Railway Company and the Union Pacific Railroad Company will seek and obtain similar relief from the Commission which will mean an additional revenue loss to the Great Northern. Affiant estimates such additional revenue loss, if this occurs, to exceed $115,000.00 per year, with a potential revenue loss of over $450,000.00 per year.

By its report and order in Docket 32015 dated July 14, 1958, Division 2 of the Interstate Commerce Commission found that,

> "... the loss to the Great Northern, measured by the difference between its share of the present joint rates from origins via Spokane to Portland and of its share of the joint through rates sought via Spokane to the California destinations, as computed above, would amount to $1.35 per ton."

If the order of the Commission dated December 1, 1958, affirming the order of Division 2 dated July 14, 1958, is permitted to become effective, the Great Northern will suffer irreparable injury due to the revenue losses which it will suffer as a result of being compelled by said orders to maintain and apply to the transportation of wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern east and south of Cut-

[fol. 93] bank, Montana, including Cutbank, to points in Oregon south of Portland, and to points in California on the lines of the Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company, over the routes of the Great Northern to Spokane, Washington, Union Pacific Railroad Company to Portland, Oregon, with transit at Milton-Freewater, Oregon, thence the Southern Pacific Company (in connection with the Atchison, Topeka & Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other railroads.

The Great Northern would have no adequate remedy at law to recover the damages through revenue losses which it would incur as a result of the Commission's orders being permitted to become effective. Only by maintenance of the status quo pending a determination on appeal of this Court of the propriety of the Commission's order affirming the order of Division 2, will it be possible to avoid irreparable injury to the Great Northern if the Court should ultimately find that the Interstate Commerce Commission erred in compelling the Great Northern, without its consent, to establish the prescribed new through routes and joint rates applicable thereto which will substantially shorthaul the Great Northern. If this Court grants the motion for temporary restraining order herein sought, and ultimately determines that the report and orders of the Commission in Docket 32015 assailed in this proceeding are lawful, no damage whatever will have been incurred by any of the parties to the proceedings before the Inter- [fol. 94] state Commerce Commission in Docket 32015, or this proceeding, or the shipping public.

Ernest F. McGuire

Subscribed and sworn to before me this 10th day of January, 1959.

Robert F. Garing, Notary Public in and for the State of Washington, residing at Seattle. My Commission Expires April 25, 1962.

(Notarial seal)

[fol. 95] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

4-59-Civ-5

[Title omitted]

ORDER FOR HEARING ON PETITION FOR INJUNCTION PENDING APPEAL AND ORDER EXTENDING STAY—June 12, 1959

Pursuant to Rule 62C of the Federal Rules of Civil Procedure a Petition for an Injunction Pending Appeal having been presented by the plaintiff in the above entitled cause and said petitioner having requested that pending determination of said Petition the court extend the stay granted herein on May 15, 1959, and it appearing that the petitioner proposes to appeal to the Supreme Court of the United States from the final order entered herein on May 15, 1959.

It Is Ordered that said Petition for an Injunction Pending Appeal be and it is hereby set for hearing at the United States Court Rooms in the United States Courts Building in the City of Minneapolis, Minnesota, on the 22 day of June, 1959, at 10 o'clock a.m. on said day. That seven days' notice of said hearing be given to the defendants and to the [fol. 96] intervening defendant herein.

It Is Further Ordered that the stay of the final order of the court herein which was granted on May 15, 1959, be extended and continued in effect until the hearing and determination of said Petition.

Dated this 11th day of June, 1959.

Charles J. Vogel, U. S. Circuit Judge; Gunnar H. Nordbye, U. S. District Judge; Edward J. Devitt, U. S. District Judge.

[fol. 97] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Action No. 4-59 Civ. 5

GREAT NORTHERN RAILWAY COMPANY, a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants,

and

CENTENNIAL MILLS, INC., Intervening Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 12, 1959

I

Notice is hereby given that Great Northern Railway Company, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order of the United States District Court for the District of Minnesota, entitled "Memorandum Decision," dated and entered in this case on May 15, 1959, dismissing the plaintiff's complaint and discharging the temporary restraining order entered herein on January 15, 1959. This appeal is taken pursuant to 28 U.S.C.A. §1253.

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record before the District Court, including therein all pleadings, motions, orders and notices filed in this

[fol. 98] cause, said "Memorandum Decision" of May 15, 1959, the reporter's transcript of the hearing and oral argument held April 7, 1959, the certified copy of the record before the Interstate Commerce Commission introduced and received at said hearing and argument on April 7, 1959, and all briefs and other documents and papers forming a part of the record of the District Court herein.

III

The following questions are presented by this appeal:

1. Whether the District Court erred in refusing to set aside an order of the Interstate Commerce Commission based on a finding that undue preference and prejudice in violation of Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. §3(1)) results from participation by a railroad in through routes and joint rates from origins on its own line to destinations on the lines of other railroads with the privilege of milling in transit available thereunder and absence of participation by such originating railroad in a proposed, new, alternate through route from the same origins to the same destinations via the line of an independent railroad with transit on the line of such latter railroad, such alternate, proposed through route substantially short hauling said originating railroad.

2. Whether the District Court erred in refusing to set aside the order of the Interstate Commerce Commission under attack because of the absence of substantial evidence to support the Commission's finding under Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. §3(1)).

3. Whether the District Court erred in refusing to set aside said Commission's order, which will require the establishment of a new through route short-hauling an originating railroad without the findings requisite to such [fol. 99] an order under clause (a) or clause (b) of Section 15(4) of the Interstate Commerce Act (49 U.S.C.A. §15(4)), and the subsidiary question of whether the District Court erred in concluding that said Commission's finding of undue preference and prejudice under Section

3(1) of the Interstate Commerce Act made inapplicable the limitations upon the Commission's power to prescribe through routes resulting in the short-hauling of an originating carrier, as such limitations are set forth in said Section 15(4), and dispensed with the necessity for findings thereunder.

4. Whether the District Court erred in refusing to set aside said order of the Interstate Commerce Commission upon the ground that there is not substantial evidence in the record to support its finding that the prescribed new through route and joint rates ordered are "necessary and desirable in the public interest."

Anthony Kane, Louis E. Torinus, Jr., Curtis H. Berg, Elmer B. Trousdale, Attorneys for Great Northern Railway Company, 175 East Fourth Street, St. Paul 1, Minnesota.

Dated this 12th day of June, 1959.

[fol. 101] Proof of Service (omitted in printing).

[fol. 102] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Action No. 4 59 Civ. 5

[Title omitted]

NOTICE OF HEARING—Filed June 17, 1959

To the Defendants and to the Intervening Defendant Herein:

You, and each of you, are hereby given notice that the District Court of the United States for the District of Minnesota has set for hearing at the United States Court Rooms in the United States Courts Building in the city

of Minneapolis, Minnesota, on the 22nd day of June, 1959, at 10:00 o'clock A.M. on said day, the petition of plaintiff for an injunction pending appeal in the above-entitled cause.

There is served upon each of you herewith a copy of said petition and a copy of the order of the District Court of the United States for the District of Minnesota dated [fol. 103] June 11, 1959, setting said petition for hearing and in the meantime extending the stay granted in connection with the court's "Memorandum Decision" and final order of May 15, 1959.

Dated this 12th day of June, 1959.

Anthony Kane, Louis E. Torinus, Jr., Curtis H. Berg, Elmer B. Trousdale, Attorneys for Plaintiff, 1120 Great Northern Building, St. Paul 1, Minnesota.

[fol. 105] Proof of Service (omitted in printing).

[fol. 113]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MORITZ MILBURN IN OPPOSITION TO PETITION FOR INJUNCTION PENDING APPEAL

State of Washington,
County of King, ss.

Moritz Milburn, being first duly sworn, upon his oath deposes and says:

That he is President of Centennial Mills, Inc., the intervening defendant in the above entitled cause, and makes this affidavit in its behalf.

Centennial Mills, Inc., owns and operates the flour mill located at Milton-Freewater in the northeastern part of the State of Oregon. This mill has for a number of years disposed of most of its flour made from Montana hard Spring wheat in the California market, notwithstanding the fact that the lower joint rates enjoyed by competing mills do not apply over the route via Milton-Freewater,

due to the refusal of plaintiff Great Northern Railway Company to establish such rates.

Centennial Mills has thus far been able to retain its business in California by the substitution of billing, but this is becoming increasingly more difficult and expensive, and unless the relief granted by the order of the Interstate Commerce Commission in Docket No. 32015 is made effective in the near future, the Company will be unable to retain this business, which will probably make it necessary to shut down the mill in question.

The difficulties in securing the necessary billing have been greatly increased recently by reductions in the rail rates from interior points to North Pacific Coast terminals without corresponding reductions to California, which makes it practically impossible for Centennial Mills to retain its business in California without the same joint rates as enjoyed by competing mills.

Under the conditions which now exist, it has been necessary in order to obtain billing to ship to California in competition with other mills to unload wheat at Spokane originating on the Great Northern in Montana, and then reload it and ship it to the mill at Milton-Freewater instead of sending it there direct.

[fol. 114] As set forth in the report of the Commission in the case above referred to, 304, I.C.C. 491, at page 498, during the crop year 1955-6, about 250,000 bushels were handled in that manner at a cost of approximately $10,000.00. The cost incurred in subsequent crop years was as follows: 1956-7, $9,300.00; 1957-8, $11,580.00; and 1958-9 to June 1, $9,550.00; making a total expenditure of $40,430.00. This does not include any storage at Spokane or inconvenience in double-handling the grain. This also entails considerable expense for the carriers because it involves extra switching, requires more time and keeps the cars in service longer.

In addition to the above costs, it has been necessary to ship flour and feed to points in Oregon south of Portland on which the combination of rates were paid, which are substantially higher than the joint rates. As stated in the report of the Commission above referred to at page 496, during the crop year 1955-6, approximately $6,000.00

more was paid in transportation charges than would have been paid on the joint rates. The corresponding figures for subsequent crop years were as follows: 1956-7, $5,761.00; 1957-8, $6,245.00; and 1958-9 to June 1, $5,422.00; making a total of $23,428.00.

Because of the competitive situation, the cost of rehandling grain at Spokane for transit purposes and the payment of combination rates to destinations in Oregon is becoming so great that it makes it extremely difficult to continue this business unless joint rates are established. It is imperative, therefore, that the joint rates be made effective as soon as possible.

Moritz Milburn

Subscribed and sworn to before me this 19th day of June, 1959.

Clarence A. Linkens, Notary Public in and for the State of Washington, residing at Seattle.

(Notarial Seal)

[fol. 115] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Action No. 4-59 Civ. 5

GREAT NORTHERN RAILWAY COMPANY,
a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants,

and

CENTENNIAL MILLS, INC., Intervening Defendant.

AFFIDAVIT OF VINCENT P. BROWN IN SUPPORT OF PLAINTIFF'S PETITION FOR AN INJUNCTION PENDING APPEAL—Filed June 22, 1959

State of Washington,
County of King, ss.

Vincent P. Brown, being first duly sworn on oath, makes the following statement:

I am General Freight Traffic Manager of Great Northern Railway Company, the plaintiff above named. I have been actively employed in connection with the construction and publication of freight rates and the routing of traffic for thirty-three years.

My statement is supplemental to the affidavit of Ernest F. McGuire dated January 10, 1959, which was filed with this Court in support of plaintiff's motion for a temporary restraining order, a copy of which affidavit is also attached [fol. 116] to plaintiff's petition for an injunction pending appeal. I subscribe to the statements which Mr. McGuire has made in said affidavit.

The purpose of my supplemental statement is threefold: (1) to show, as Mr. McGuire has done, the direct, immediate and irreparable loss which Great Northern will sustain by compliance with the Commission's order at this time; (2) to show that the natural and logical consequence of the principle underlying the Commission's holding in its Docket No. 32015 now sustained by the District Court herein, namely, the disadvantage to an off-line miller or transit operator resulting from retention by an originating carrier of its long haul deprives such carrier of the protection against short-hauling contained in Section 15(4) of the Interstate Commerce Act, will cost the Great Northern Railway Company millions of dollars since it is a granger railroad heavily dependent upon revenues from the grain shipment which it originates; and (3) to show that compliance with the Commission's order in this Docket 32015 at this time and before the Supreme Court of the United States has had an opportunity to pass upon the important legal point involved will invite complaints to the Commission on the part of the other flour mills for

treatment equivalent to that accorded to Centennial Mills, Inc. (which has succeeded to the rights of complainant in Docket 32015); that such complaints would be resisted, and that it would be in the public interest and the interest of the milling trade, which has built up its business practices on existing freight rates and routing, to stay any action in this proceeding until the Supreme Court of the United States has disposed of the legal question involved herein.

[fol. 117] Great Northern Railway Company, herein referred to as Great Northern, is the northernmost transcontinental railroad in the United States. The concentrations of population on the lines of the Great Northern are at its eastern terminals at Minneapolis and St. Paul, Minnesota, the Head of the Great Lakes, and Sioux City, Iowa, and at its western terminals on the Pacific Coast. In the area of almost 1,800 miles between these concentrations of population Great Northern serves a vast agricultural empire and the greatest milling wheat-producing areas of the United States. Great Northern maintains for the purpose of moving these products of agriculture, including grain, an extensive system of main and branch lines through the states of Minnesota, North Dakota, Montana, Idaho and Washington.

In the year 1958, Great Northern handled 66,626 carload shipments of wheat with a total Great Northern freight revenue of $32,639,200.00. Historically, since the railroad was constructed westward from the Twin Cities to the Pacific Coast, Great Northern has assisted materially and directly the development of products of agriculture along its line, and in turn Great Northern has depended for an important share of its freight revenues upon products of agriculture, particularly grain. Its 1958 traffic in grain and grain products consisted of 145,602 cars producing $60,211,106.00 in revenue, which represented over 26 per cent of its total system revenues from carload shipments for that year.

Like other western granger railroads, Great Northern has maintained single-line rates on bases prescribed by the Interstate Commerce Commission from its producing areas to its eastern and western terminals. An outstand-

ing characteristic of the western grain rate structure is its absence (with very few exceptions) of multiple line routes which would permit short hauling the originating [fol. 118] carrier and unnecessary and wasteful interchanges. While the milling grains, and particularly the Spring and Durum wheats grown along Great Northern have been attractive to mills, Great Northern's extensive system of gathering lines, inspection and transit points, have all been related principally to the single line movements of grain and grain products to and through its eastern and western terminals.

The revenues received from grain are vital to the sound and efficient operation of Great Northern not only in the transportation of grain produced along its line, which requires the extensive movement of empty cars and the maintenance of expensive facilities for the proper merchandising of these agricultural products, but also in fulfillment of its common carrier responsibility to provide a sound and efficient over-all transportation service in states of relatively low traffic density and population.

The decision in the Preston-Shaffer case, the Commission's Docket 32015, which was before this Court in the instant case and which directs that Great Northern milling wheat originated on its line in Montana shall be available for diversion for milling in transit into grain products at a mill located on the Union Pacific in Oregon for final termination of grain products in the important and rapidly expanding market in California, will result in depriving Great Northern of the haul from the producing areas involved to its normal terminals of Bieber, California, Chemult and Portland, Oregon, where it connects with lines serving the California markets.

Based on the present operation of the Milton-Freewater plant, Ernest F. McGuire has calculated that the decision in this case will cause a revenue loss to the Great Northern of $38,846.00 annually. This estimate is a mini- [fol. 119] mum figure. This record shows that during the year July 1, 1955 to June 30, 1956, the three mills then operated by Preston-Shaffer purchased a total of 55,000,000 pounds of Montana wheat at Great Northern origins. This shows that if all three mills are again operated and are

accorded the privilege here prescribed, the revenue loss to the Great Northern will approximate $53,500.00 per annum. Other interior mills to which Great Northern milling grains are attractive, including the mills in Cheney, Washington, Helix and Pendleton, Oregon, will seek similar transit if the decision in the Preston-Shaffer case stands. In my opinion the statement of Ernest F. McGuire that the additional loss from such demands will range from $115,000.00 to $450,000.00 a year is a reasonable estimate.

The evidence before the Commission in the Preston-Shaffer case contains references to the application of rates from central Montana to California through the Butte, Montana Gateway which was required by the Interstate Commerce Commission in *Grain and Grain Products,* 205 I.C.C. 301. This Butte route and through rate applies only from a limited area in central Montana and does not apply from Montana origins east of Havre, such territory east of Havre being an extensive and highly important grain-producing territory. The latter territory is, however, embraced in the Commission's order in Docket 32015, the Preston-Shaffer case.

Under the principles established by the decision in this case, any mill in the west located off the line of the originating carrier and claiming a disadvantage in marketing its flour because the originating carrier retains its long haul will be afforded the right to require, as has been afforded Centennial Mills in the instant case, that it be permitted to reach the principal markets on exactly the same [fol. 120] basis as mills located on the long haul routes of the originating carrier. This principle, if applied throughout the west, will cause the use of the multiplicity of junction between the Great Northern and other railroads west of its eastern terminals and east of its western terminals in the states of Montana, North Dakota, Idaho and Washington, and will establish a succession of short haul routes which on a conservative basis will deprive Great Northern of a minimum of 10 per cent of its gross revenue presently derived from the transportation of wheat. Ten per cent of the Great Northern annual revenue from wheat approximates $3,250,000.00. There is in fact practically no ceiling on the extent of the loss from the potential diver-

sion of grain which the Great Northern originates under the principle of this case. The principle established by this case is so important that it should not be permitted to spread throughout the western territory until the Supreme Court has had an opportunity to pass on the correctness of this decision.

The evidence in the Preston-Shaffer case shows that the annual volume of flour sold in California by complainant's mills made from Montana Spring wheats was estimated to be 39,660 tons. The revenue loss to the Great Northern through the substitution of the Spokane Gateway which would short-haul it for the normal long haul gateways was shown to be $5.36 per ton. (Present Great Northern revenue via long haul routes is $12.77 per ton as compared to Great Northern revenue of $7.41 per ton on the prescribed short haul route.) If the theory on which the Preston-Shaffer case was decided by the Interstate Commerce Commission be applied to the movement of wheat via other gateways, including gateways close to the origin territory in Montana (such as the Helena junction with the Northern Pacific and the Great Falls with the Milwaukee), Great Northern's revenue loss per [fol. 121] ton would extend to as high as $8 or $10 because of this substitution of a short haul gateway nearer the country origin for the normal long haul routes to let interior mills on other railroads use grain produced along the Great Northern in contravention of the transcontinental railroads' long-standing policy of preserving in the public interest their long hauls on agricultural products and grain from producing areas to their terminals.

All flour mills in the west dispose of their products in the major centers of population. All seek the better qualities of milling grains wherever they may be found. The circumstances advanced for prescription of a new short haul route and a transit privilege in the interest of the mill at Milton-Freewater could and would be immediately advanced in the interest of mills located on other railroads in Washington, Oregon, and other states. Consequently, the revenue loss to Great Northern that would be generated by compliance with the Interstate Commerce Commission's decision in the Preston-Shaffer case would

in all likelihood not be confined to that situation alone, but would be extended because of demands from other mills which would have to be anticipated in the event the Preston-Shaffer order were complied with.

Further affiant sayeth not, except that this affidavit is in support of the plaintiff's application for an injunction against the Commission's outstanding order in its Docket 32015 pending determination of an appeal to the Supreme Court of the United States from the order of the United States District Court for the District of Minnesota made [fol. 122] and filed herein on May 15, 1959.

Vincent P. Brown

Subscribed and sworn to before me this 19th day of June, 1959.

Betty Ann Best, Notary Public in and for the State of Washington, residing at Seattle. My Commission Expires March 28, 1963.

[fol. 123] Affidavit of Service (omitted in printing).

[fol. 159] [File endorsement omitted].

In District Court of the United States

District of Minnesota

Fourth Division

Civil Action No. 4 59 Civ. 5

Great Northern Railway Company, a corporation, Plaintiff,

vs.

United States of America and Interstate Commerce Commission, Defendants,

and

Centennial Mills, Inc., Intervening Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INJUNCTION PENDING APPEAL—July 24, 1959

The above-entitled matter came duly on for hearing before the court above named on Monday, the 22d day of June, 1959, at 10:00 o'clock a.m., on the petition of the plaintiff for an injunction restraining and enjoining the enforcement of the order of the Interstate Commerce Commission entered July 14, 1958, as thereafter amended, in its Docket No. 32015, *Preston-Shaffer Milling Company* v. *Great Northern Railway Company et al.*, during the pendency of an appeal taken by the plaintiff herein to the Supreme Court of the United States from the final order of the court herein dated May 15, 1959. Plaintiff was represented by its counsel, Louis E. Torinus, Jr.; defendants United States of America and Interstate Commerce Commission were represented by C. Paul Jones, Assistant United States Attorney; and Centennial Mills, Inc., intervening defendant, was represented by its attorney, S. J. Wettrick. There were no other appearances.

[fol. 160] Upon all the files and records herein, including said petition for an injunction pending appeal, the affidavit attached thereto, and the affidavits and memoranda submitted by the parties on June 22, 1959, and full hearing and argument having been had, the court, being fully advised, makes the following findings of fact:

1. The Interstate Commerce Commission by Division 2 made its report and order in its Docket No. 32015, entitled (30) days' notice to the Commission and to the public, "Preston-Shaffer Milling Company v. Great Northern Railway Company et al.," dated July 14, 1958, wherein the said Commission ordered the plaintiff herein, Great Northern Railway Company, to establish upon not less than thirty and thereafter to maintain and apply to the transportation of wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern Railway Company east and south of Cut Bank, Montana, including Cut Bank, Montana, to points in Oregon south of Portland and to points in California on the lines of the Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company over the routes of the Great Northern Rail-

way Company to Spokane, Union Pacific Railroad Company to Portland, Oregon, with transit at Milton-Freewater, Oregon, thence the Southern Pacific (in connection with The Atchison, Topeka and Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes. Said order dated July 14, 1958, was stayed pending disposition of a petition for reconsideration filed with said Commission [fol. 161] subsequent to July 14, 1958. By order dated December 1, 1958, said Commission denied plaintiff's petition for reconsideration and modified said order of July 14, 1958, which had meanwhile been stayed pending disposition of said petition, so as to become effective January 16, 1959, without change in the requirements of said order. On January 13, 1959, plaintiff received telegraphic advice from the Commission that said order had been further modified so as to become effective February 16, 1959.

2. On January 15, 1959, this court made and filed herein its temporary restraining order restraining and enjoining the operation, application and effectiveness of said order of the Interstate Commerce Commission dated July 14, 1958, as theretofore modified, until the further hearing and order of this court herein. On January 19, 1959, said Commission entered its further order in said Docket 32015 reciting that "solely in obedience to said temporary restraining order" the effective date, operation and effectiveness of said order of the Commission, Division 2, dated July 14, 1958, as modified, be postponed and suspended until the further order of the Commission.

3. On May 15, 1959, this action for a permanent injunction enjoining, setting aside and annulling said order of the Commission, as amended, having been submitted to this court upon the pleadings, the briefs of the parties, and a hearing held before this court on April 7, 1959, at which the court received in evidence the record before the Interstate Commerce Commission in said Docket 32015, this court made and filed its memorandum decision and order dismissing the plaintiff's complaint, discharging said temporary restraining order and granting a stay of thirty days.

[fol. 162] 4. On June 12, 1959, plaintiff filed herein a notice of appeal to the Supreme Court of the United States from said memorandum decision and order of May 15, 1959, said notice of appeal being accompanied by proof of service on the several parties to this proceeding.

5. On June 12, 1959, this court filed herein its order dated June 11, 1959, setting for hearing on June 22, 1959, a petition by plaintiff for an injunction restraining and enjoining the enforcement of said Commission's order pending appeal, said order filed June 12, 1959, also providing that the stay which was granted on May 15, 1959, and hereinbefore referred to be extended and continued in effect until the hearing and determination of said petition for injunction pending appeal.

6. It appears from the affidavit of Ernest F. McGuire, copy of which is attached to said petition for an injunction pending appeal, that if said injunction is not granted, plaintiff will be required to establish by appropriate tariff publication the new through routes and joint rates described in said order of the Commission, that such action will result in a minimum loss of revenue to the plaintiff of $36,846 per year, and that this loss will be irretrievable. It appears from the affidavit of Vincent P. Brown submitted June 22, 1959, that compliance with said order would result in complaints on the part of operators of numerous flour mills not located on the lines of plaintiff, for treatment equiva-
[fol. 163] lent to that accorded to the mill at Milton-Freewater referred to in the Commission's decision in its Docket 32015; that if such complaints were not resisted, plaintiff would sustain further substantial, irretrievable revenue losses; that plaintiff's 1958 traffic in grain and grain products produced $60,211,106 in freight revenue, of which $32,639,200 represented revenues from the transportation of wheat; and that in 1958, grain and grain product revenues constituted 26 percent of plaintiff's total system revenues from carload shipments for that year.

7. It appears from the affidavit of Moritz Milburn submitted June 22, 1959, that Centennial Mills, Inc., has thus far been able to retain its business in California by the substitution of billing; that this is becoming increasingly

difficult and expensive; that unless the relief granted by said order of the Interstate Commerce Commission is made effective in the near future Centennial Mills, Inc., will be unable to retain this business, which will probably make it necessary to shut down its Milton-Freewater mill; that Centennial Mills, Inc., under present conditions, in order to obtain billing to ship to California, unloads wheat at Spokane originating on the Great Northern and reships such wheat to Milton-Freewater; that this operation at Spokane is inconvenient and costs approximately $10,000 per year plus storage expenses; and that because of the absence of joint rates to points in Oregon south of Portland, shipments to such points from Milton-Freewater have resulted in the assessment of freight charges higher by about $6,000 per year than would be the case if joint rates were available.

8. In the event plaintiff should comply with said order of the Interstate Commerce Commission pending appeal, it would be deprived of the protection against short-hauling provided in Section 15(4) were the Supreme Court to hold said order invalid and plaintiff thereupon attempted to cancel such compliance. In such event, in attempting to cancel the routes and rates required by said order, plaintiff would become subject to the provisions of Section 15(3) of the Interstate Commerce Act, which provides that if a through route or joint rate is sought to be canceled "without the consent of all carriers parties thereto or authoriza-
[fol. 164] tion by the Commission," the Commission may suspend such proposed cancellation and in such event the carrier proposing cancellation has the burden of proving such cancellation consistent with the public interest without regard to the provisions of Section 15(4). This circumstance, together with the circumstances described in the affidavits referred to in finding No. 6 herein, indicates that any revenue losses sustained by plaintiff as a result of compliance with the Commission's order might well continue to be experienced long after the termination of said appeal even if its appeal were successful, and constitutes a special reason why the order of the Commission ought not to become operative until its validity can be determined by the Supreme Court of the United States.

9. Plaintiff has filed with this court a bond conditioned to indemnify Centennial Mills, Inc., in the event of affirmance of this court's decision and order of May 15, 1959, or dismissal of its appeal, against the payment of freight charges pending appeal on the involved traffic in excess of charges which would become applicable were an injunction pending appeal not granted, and against the payment by Centennial, pending appeal, of inspection, handling and storage charges at Spokane on wheat originating at the Montana points involved, unloaded at Spokane and reshipped to Milton-Freewater.

10. The injury which plaintiff would suffer from compliance with the said order of the Interstate Commerce Commission if this court's order of May 15, 1959, should finally be held invalid appears to be greater than any injury which defendants or the intervening defendant Centennial Mills, Inc., might suffer if this court's order were upheld and the operation and effectiveness of the Commission's order were stayed pending appeal upon the filing of the bond referred to in paragraph No. 9 hereof. The desirability in the public interest of avoiding disruption of existing rates and routing applicable to the grain traffic until the validity of the Commission's order shall be finally determined is also a factor which weighs against any considerations in favor of denying the injunction.

[fol. 165] Conclusions of Law

1. Decision in this case depends upon a question of law on which there appears to be a conflict among the several district courts of the United States.

2. Considering all the circumstances set forth in the above findings, the court concludes that it should exercise its discretion by ordering the entry of an injunction restraining and enjoining the operation, application and effectiveness of said order of the Interstate Commerce Commission pending appeal, said injunction to continue until the final determination of said appeal or the further order of the court herein or of the United States Supreme Court.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiff's petition for an injunction pending appeal be, and it hereby is, granted and that the operation, application and effectiveness of said order of the Interstate Commerce Commission in its Docket 32015, *Preston-Shaffer Milling Company* v. *Great Northern Railway Company, et al.*, dated July 14, 1958, as thereafter modified, be, and they hereby are, restrained and enjoined pending plaintiff's appeal to the United States Supreme Court from the memorandum decision and order of this court dated May 15, 1959, and until final determination on such appeal and order pursuant thereto, unless and until otherwise ordered by this court or by the Supreme Court of the United States.

Dated this 24th day of July, 1959.

Charles J. Vogel, United States Circuit Judge
Gunnar H. Nordbye, United States District Judge
Edward J. Devitt, United States District Judge

[fol. 176] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 177]

SUPREME COURT OF THE UNITED STATES

No. 297, October Term, 1959

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

Appeal from the United States District Court for the District of Minnesota.

ORDER NOTING PROBABLE JURISDICTION—October 19, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 19, 1959

[fol. d]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. .....

PRESTON-SHAFFER MILLING CO., Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY (PACIFIC LINES), and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendants.

COMPLAINT—Filed June 19, 1956

The complaint of the above-named complainant respectfully represents and shows:

I.

Complainant is a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal office in the City of Walla Walla, Washington.

II.

Defendants are common carriers engaged in the transportation of property between the points hereinafter mentioned, and as such common carriers are subject to the [fol. e] provisions of the Interstate Commerce Act. For convenience defendants will hereinafter be referred to as Great Northern, Union Pacific, Southern Pacific and Santa Fe, respectively.

III.

Complainant owns and operates flour mills and adjoining elevators at Waitsburg, Washington, and at Milton-Freewater and Athena, Oregon, which will hereinafter sometimes be referred to collectively as complainant's milling points. These mills are served by the Union Pacific, which

accords them the same transit privileges as are generally applicable in connection with the transportation of grain and grain products.

IV.

The purpose of this complaint is to bring about the establishment of reasonable and non-prejudicial rates for the transportation of wheat and its products, in carloads, from main and branch-line points of the Great Northern in the State of Montana east and south of Cut Bank, including Cut Bank and points in the so-called triangle territory, to California and points in Oregon south of Portland, over the route of the Great Northern to Spokane, the Union Pacific to Portland, and the Southern Pacific and Santa Fe beyond, with the usual transit privileges at the points where complainant's mills are located.

V.

The State of California is an important market for flour produced in the States of Washington, Oregon, Idaho, Utah [fol. f] and Montana, and in order to supply that market it is necessary for the mills to have the high protein hard spring wheat produced in the State of Montana, principally in the territory served by the Great Northern. Practically all of the mills in the States named, as well as the local mills in California, are in a position to obtain this high protein wheat and ship it and its products to California, at joint rates, while complainant is required to pay combination rates over Portland, which are substantially higher. For example, the through rate from Chester, Montana, over the route of the Great Northern via Seattle to Portland, thence Southern Pacific to San Francisco and Los Angeles, is 1.18½ cents per one hundred pounds, while the combination of rates over the route of the Great Northern to Spokane and the Union Pacific to Portland, on which complainant's mills are located, thence Southern Pacific, is $1.49 to San Francisco and $1.77 to Los Angeles. Complainant's mills are thus required to pay 30½ cents more to San Francisco and 58½ cents more to Los Angeles for the transportation of wheat and its products from Chester, Montana, and similar differences exist generally in the rates

from the points of origin to the points of destination here involved. (See foot-note for tariff references.)

[fol. g]

VI.

Complainant's mills are in keen and active competition with numerous other mills in the states named in the purchase of wheat and the sale and distribution of the products thereof. All of the mills buy wheat at a common price, and each produces a similar type of flour containing a large amount of high protein hard spring wheat from the territory of origin above described. This flour is sold in California and Oregon on a competitive basis, and any freight rate disadvantages on the wheat in the flour mixture must be absorbed by the mill having the disadvantages. The margin of profit is small and a rate differential of even a cent or two makes it impossible for the mill which is at a disadvantage to sell its products in competition with the other mills.

VII.

In view of the foregoing, complainant alleges that the combination of rates which it is required to pay on wheat and its products over the route from the territory of origin via the Great Northern to Spokane, the Union Pacific to Portland, and the Southern Pacific and Santa Fe beyond, to points in California and points in Oregon south of Portland, are unjust and unreasonable to the extent they exceed the joint rates applicable over other routes, in violation of section 1 of the Act.

The through rate of $1.18½ from Chester, Montana, to San Francisco is published in Pacific Southcoast Freight Bureau Tariff, 241-E, I.C.C. 1577 (Group 178, Page 177), J. P. Haynes, Agent, subject to X-175 and X-196 increases.

The local rates from Portland to San Francisco and Los Angeles may be found in the same tariff (Items 4470 and 4750); with the increases, they are now 77 and 105 cents, respectively.

The local rate from Chester to Portland is covered by North Pacific Coast Freight Bureau Tariff 13-E, I.C.C. 888 (Item 3670), W. R. Watson, Agent. With the increases, this rate is now 72 cents.

VIII.

Complainant further alleges that the failure of defendants to establish and maintain the same joint rates with [fol. h] transit over the route on which complainant's mills are located as over other routes from the territory of origin to California and points in Oregon south of Portland, subjects complainant and its traffic to undue and unreasonable prejudice and disadvantages and gives to its competitors on other routes an undue and unreasonable preference and advantage, in violation of section 3 of the Act.

IX.

Complainant further alleges that the situation herein complained of is due to the fact that the Great Northern refuses to enter into joint rates over the route which serves complainant's mills in order that it may retain a longer haul on the traffic. This raises the question as to the authority of the Commission to require the establishment of joint rates over the route via complainant's milling points. With regard to this, complainant alleges that the carriers concerned have continuously provided through service for a number of years over the route from Montana to Spokane, the Union Pacific to Portland, and the Southern Pacific and Santa Fe to destinations in California and Oregon, at the combination of the separately established rates over Portland, which therefore constitutes a through route within the meaning of the Act, and that the Commission has authority to satisfy the complaint herein under the provisions of sections 1 and 3 of the Act.

[fol. i] X.

Notwithstanding the considerations mentioned in Paragraph IX, complainant further alleges as a matter of precaution, that through routes and reasonable joint rates from the territory of origin via the Great Northern to Spokane, the Union Pacific to Portland and the Southern Pacific and Santa Fe to points in Oregon south of Portland and to California, are required to give complainant's mills an opportunity to do business in competition with other

mills in the destination territory, and are necessary and desirable in the public interest, within the meaning of section 15 (3) of the Act; that such through routes and reasonable joint rates are necessary in order to provide adequate and more economic transportation; and that these facts support the findings required by section 15 (4) of the Act as a condition for the establishment of through routes which short-haul a carrier.

Wherefore, complainant prays that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants to cease and desist from the aforesaid violations of the Act, and establish and put in force and apply in the future to the transportation of wheat and its products from the points of origin to the points of destination herein described, over the route of the Great Northern to Spokane, the Union Pacific to Portland, and the Southern Pacific and Santa Fe beyond, in lieu of the combination rates over Portland, reasonable joint rates with transit [fol. j] which do not exceed the joint rates applicable over other routes; that an order be entered requiring defendants to establish through routes in accordance with paragraph X herein, if it should be found that such routes do not now exist; and that such other and further order or orders be made as the Commission may consider proper in the premises.

It is respectfully requested that hearing on this complaint be held at Seattle, Washington.

Dated at Seattle Washington, this 15th day of June, 1956.

S. J. Wettrick, Attorney for Complainant, Arctic Building, Seattle 4, Washington.

[fol. 1]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 32015

PRESTON-SHAFFER MILLING CO.,

v.

GREAT NORTHERN RAILWAY COMPANY, ET AL.

Stenographic Minutes

Parlor 1, Olympic Hotel,
Seattle, Washington,
Wednesday, October 3, 1956.

Met, pursuant to notice, at 9:30 a.m.

Before:

EDWARD L. BOISSEREE, Examiner.

APPEARANCES:

S. J. Wettrick, Arctic Building, Seattle 4, Washington, appearing for complainant.

Philip I. Welk, 113 East Alder Street, Walla Walla, Washington, appearing for complainant.

W. C. Mikkelsen, 113 East Alder Street, Walla Walla, Washington, appearing for complainant.

R. Paul Tjossem, 404 Union Street, Seattle 1, Washington, appearing for defendant.

Robert F. Garing, 404 Union Street, Seattle 1, Washington, appearing for defendant.

F. W. Fuller, 3235 Sixteenth Avenue S.W., Seattle 4, Washington, appearing for Fisher Flouring Mills Co., intervenors.

[fol. 3] PROCEEDINGS

Exam. Boisseree: We will come to order, gentlemen.

The Interstate Commerce Commission has assigned for hearing at this time and place Docket No. 32015 entitled Preston-Shaffer Milling Company versus Great Northern Railway Company, et al.

Who appears for the complainant?

Mr. Wettrick: S. J. Wettrick, and I think I had better enter the names also of the witnesses, Philip I. Welk, and Walter C. Mikkelsen for the complainant.

Exam. Boisseree: And all three of you are present?

Mr. Wettrick: Yes.

Exam. Boisseree: And will you give your address, Mr. Wettrick.

Mr. Wettrick: My address is Arctic Building, Seattle.

Exam. Boisseree: Who appears for the defendants?

Mr. Tjossem: R. Paul Tjossem, registered practitioner and also attorney, representing the Great Northern Railway Company, 404 Union Street, Seattle 1, Washington.

Exam. Boisseree: And are there any other appearances for the defendants?

(No response.)

Exam. Boisseree: Are there any other appearances, intervenors?

(No response.)

Exam. Boisseree: I take it there are none.

[fol. 4]

COLLOQUY BETWEEN EXAMINER AND COUNSEL

By complaint filed June 19, 1956, the complainant alleges that the rates on wheat and wheat products from origins on the defendant Great Northern in Montana east and south of Cut Bank, including Cut Bank, and points in the so-called triangle territory, to California and points in Oregon south of Portland via the Great Northern to Spokane, the Union Pacific to Portland, and the Southern Pacific and Santa Fe beyond, with usual transit, at complainant's mills at Waitsburg, Washington, and Milton-

Freewater and Athena, Oregon are unreasonable and unduly prejudicial. It is also alleged in the complaint that the failure of the defendants to establish through routes and joint rates via the indicated routes results in unreasonable and unduly prejudicial rates and that such routes and reasonable joint rates are necessary and desirable in the public interest.

Mr. Wettrick, does that statement substantially reflect the issues by the complaint that you filed?

Mr. Wettrick: It does.

Exam. Boisseree: Do you agree, Mr. Tjossem?

Mr. Tjossem: Well, you went pretty fast, as far as I could see it did.

Exam. Boisseree: It is merely a preliminary statement. It is not meant to bind anybody, it is just to sort of set out a clarification of the issues. Actually the complaint will speak for itself and it will mean what it says rather than what the Examiner says.

[fol. 5] Are you ready to proceed, Mr. Wettrick?

Off the record.

(Discussion off the record.)

Exam. Boisseree: On the record.

Mr. Fuller, did you have something you wanted to state for the record?

Mr. Fuller: F. W. Fuller, traffic manager for Fisher Flouring Mills Co., 3235 Sixteenth Avenue Southwest, Seattle, 4, Washington.

On behalf of my company, Fisher Flouring Mills Co., I wish to request leave to file petition of intervention in this case in opposition to the complainant in favor of respondents. I will submit a properly filed petition before the hearing closes, or today.

Exam. Boisseree: Is there any objection to the intervention of the Fisher Flouring Mills?

Mr. Wettrick.

Mr. Wettrick: No.

Exam. Boisseree: The intervention will be authorized, Mr. Fuller, subject to this condition—

Off the record.

(Discussion off the record.)

Exam. Boisseree: On the record.

During the day, Mr. Fuller, you will have prepared and served upon the parties and two copies to the Examiner of [fol. 6] petition to intervene, and you, of course, are aware of the rules of practice, we will not permit any broadening of the issues raised by the complaint and filed by the complainant herein.

I take it, Mr. Tjossem. that you have no objection to that.

Mr. Tjossem: I have no objection.

Exam. Boisseree: Mr. Wettrick, would you call your first witness or proceed in whatever manner you desire.

Mr. Wettrick: Mr. Examiner, we have put our exhibits together in sets, and I served a copy of the set upon Mr. Tjossem yesterday noon. I didn't know whether the other defendants would be represented here or not, but we have additional sets of the exhibits sufficient to supply anyone who may be interested in the case, and I think we would save time if off the record we would mark these exhibits for identification so that they will be numbered.

Exam. Boisseree: That is agreeable to me. But I think first we had better call the witness who is going to present those exhibits and have him sworn.

Mr. Wettrick: Mr. Walter C. Mikkelsen will be the first witness.

WALTER C. MIKKELSEN was sworn and testified as follows:

Exam. Boisseree: Off the record.

(Discussion off the record.)

[fol. 7] Exam. Boisseree: On the record.

Miss Reporter, would you have the record show that the exhibits numbered 1 to 25, inclusive, were marked for identification while we were off the record.

(Complainant's Exhibits Nos. 1 to 25, inclusive, Witness Mikkelsen, were marked for identification.)

Exam. Boisseree: Before you start your examination of this witness, Mr. Wettrick, I understand, Mr. Tjossem, there is an additional appearance for the Great Northern.

Mr. Tjossem: Yes.

Mr. Garing: Robert F. Garing, 404 Union Street, Seattle, Washington, I am an attorney permitted to practice before the Commission, appearing on behalf of the Great Northern Railway Company, the defendant.

Exam. Boisseree: Mr. Wettrick, your witness is sworn, and his exhibits have been marked for identification. Will you please proceed.

Direct examination.

By Mr. Wettrick:

Q. Your full name is what?

A. My name is Walter C. Mikkelsen.

Q. And where do you live?

A. I live at Walla Walla, Washington.

Q. Are you connected with the complainant in this case?

A. I am.

[fol. 8] Q. Preston-Shaffer Milling Co.?

A. Yes, sir.

Q. How long have you been connected with that company?

A. Just over 25 years.

Q. And in what capacity?

A. I am the manager of the grain department and a vice-president of the company.

Q. Do you have to do with rate and traffic matters of the company also?

A. I do.

Q. That is, you also perform the function of the traffic manager?

A. Yes, sir.

Q. I would just like to get a little more of your background. You attended Washington State College, did you not?

A. I did.

Q. What course did you take there?

A. Marketing and business administration.

Q. And how soon after you completed your course there did you become connected with the complainant?

A. About three years.

Q. How?

A. About three years.

Q. Has your work in that connection been, you might say, an extension of the studies you pursued at the university?

[fol. 9] Mr. Tjossem: Mr. Wettrick, let's not lead the witness. If you want him to tell the history, let him tell it, but why address the answer to him.

Exam. Boisseree: Is that an objection?

Mr. Tjossem: Yes, it is, as a leading question.

Exam. Boisseree: The objection is sustained. Let the witness tell his own qualifications.

By Mr. Wettrick:

Q. Has the course you took in the university been along the line of the work you have pursued in connection with the complainant in this case?

A. I have long been interested and concerned with inter-market relationships, inter-market relationships that involved transportation costs, and it has been my hobby as well as my business.

Mr. Tjossem: I move that be stricken as not responsive.

Exam. Boisseree: The motion is denied.

By Mr. Wettrick:

Q. What is the business of complainant?

A. The milling of flour for commercial bakeries.

Q. Will you refer to the first exhibit, No. 1, and state what that is and make such comment on it as you think is important.

A. This, Mr. Wettrick, is taken from the timetable of the Union Pacific Railroad, and among other things shows the Western states of the area of origin and the area of destination involved in the complaint. We have simply taken the simple step of marking with a red pencil the area of [fol. 10] southeastern Washington and northeastern Oregon, with the approximate location of our milling plants. Those milling plants are at Waitsburg, Washington, Athena, Oregon, and Milton-Freewater, Oregon.

Q. And you have encircled the territory in red, have you not?

A. Yes, I have.

Q. Waitsburg is not shown on the map, is it?

A. It is not.

Q. Where is it located with reference to Walla Walla?

A. It is 20 miles approximately northeast of Walla Walla, and on this generalized map is located between Bolles, just north of Walla Walla, and Turner. It is approximately halfway between.

Q. And Milton and Athena are in Oregon?

A. Yes, sir.

Q. They are south of Walla Walla?

A. Yes, sir.

Q. How far is Milton from Walla Walla?

A. About 10 miles.

Q. And Athena?

A. About 22 miles.

Q. And the headquarters of the complainant are where?

A. At Walla Walla, Washington.

Q. The map shows the truck lines crossing Montana to the west and the various routes involved in this case?

A. Yes, sir.

[fol. 11] Q. Reference may be made later to a point known as Chemult. Where is that on this map?

A. It doesn't show on this map, Mr. Wettrick.

Q. Can you indicate where it is or state where it is?

A. It is located between Bend and Klamath Falls, and, as you will notice here, where the Great Northern joins the S. P. on the route from Eugene to Klamath Falls, that is the junction and the small town known as Chemult, Oregon.

Q. Just northwest of Klamath Lake there, Crater Lake?

A. Yes, sir.

Q. And where is Bieber, California, which is also a junction point? It is not shown on the map?

A. It is not shown on the map, no, sir. It is the junction of the Great Northern with the Western Pacific in northern California. I could point out approximately on the map where it is located, not specifically.

Q. Is it near Westwood shown on the map?

A. It would be near Keddie.

Q. Near Keddie?

A. Yes, sir.

Q. And that is where the Western Pacific and the—

A. (Interrupting) Great Northern exchange traffic.

Q. Yes. Perhaps you had better state in this connection what railroads serve your mills.

A. Each of our milling locations are served by the Union [fol. 12] Pacific Railroad Company and the Northern Pacific Railway Company.

Q. Do your mills have joint rates from points on the Milwaukee in Montana via Portland to points in California?

A. We do.

Q. And where do those rates apply as between the Milwaukee and the Union Pacific? I mean what are the junction points.

A. It is Milwaukee to Spokane and/or Marengo, and Union Pacific to Portland, Oregon, and Southern to Oregon and California points.

Q. Both Spokane and Marengo are shown on the map, are they not?

A. I don't see the name of Marengo on the map, Mr. Wettrick. It is near within a few miles of Tekoa which does appear on the map.

Q. Well, it is shown on the one that I have, just southwest of Spokane a short distance.

A. That is correct. My map shows Marengo shown on there, too.

Q. The map also shows the route from Montana via Butte and Ogden to points in California, does it not?

A. That is right.

Q. Now will you take up your next map and explain that.

A. We don't want to burden you with a lot of detail. We do want to point out the essential features. On this map—this is Exhibit No. 2—it shows the tree of the three transcontinental lines serving the state of Montana. The [fol. 13] legend appears down in the lower left-hand part of the sheet, and this is a map showing essentially the Montana wheat production and harvested acreage in the period 1950 to 1955, a six-year period. The bushels are shown in millions of bushels. The acres are shown in thousands of acres.

The average annual harvested acreage and production of each of the hard red winter and the hard red spring is shown within each geographical area. You will notice that where there is any shading both the bushels and the acres are shown for each winter and spring and total.

And the geographic areas that we have outlined here conform quite closely to the rate structure that applies to Montana points east and west.

Mr. Tjossem: Would you read that answer back, please.

(Answer read as follows:

"And the geographic areas that we have outlined here conform quite closely to the rate structure that applies to Montana points east and west.")

A. (Continuing) —and points in the northeastern part of the state of Montana and the southeastern part of the state of Montana take lesser rates to eastern terminals than they do to Portland and to Seattle, and that is why we have drawn out the geographic areas as we have.

The rates east of Havre on the Great Northern and of Billings on the Northern Pacific and of Harlowton on the [fol. 14] Milwaukee breaks fast in favor of movement to the eastern markets of Minneapolis and Duluth.

I would want to emphasize that the shaded areas here embrace the areas embodied in our complaint. The difference in shading will be brought out in the later exhibits, I believe, and later testimony.

I think it is appropriate to mention here that according to reliable trade estimates that so far as the north central and the central area here is concerned, and that is the area identified by the closely dotted area, is served so far as the origination of wheat, about 21 per cent is originated by the Milwaukee and about 79 per cent by the Great Northern.

It should also be stated just now, I think, that it is in this north central and in this central area, or the finely dotted area, that the West Coast Mills secure their milling wheats of the hard red winter and the hard red spring varieties, that is, under normal conditions.

To avoid a detailed description addition of the acreage and of the bushel I'd like to suggest that we turn to the next exhibit, Mr. Wettrick.

By Mr. Wettrick:

Q. Very well, you take that up and explain it.

A. I would ask, if I may, that a correction be made on the exhibit where we have shown the period 1950 to 1956, on the first line in the title, that that be changed to read [fol. 15] 1950 to 1955. That will also entail a correction on the fourth line, from 1950 to 1955.

Now, this is a companion piece to the preceding exhibit, and is simply a recapitulation to avoid burdening you with a mass of acreage and production figures. This table is broken into two sections: First, we are showing the bushelage by each winter and spring wheat that would break west because of the freight rate structure and the bushelage of each winter and spring wheat that will break east according to the freight rate structure. By that I mean that the rates from the northeastern and the southeastern areas take a lesser rate to the eastern terminals than they do to the western terminals. Approximately 59 per cent of the wheat produced in this six-year period was produced in the geographic areas that would break west and about 41 per cent would break east.

I am going to go through it rather quickly now, but I would like to call attention to two things. The bottom line of the first section shows about 51 per cent of the wheat produced in the area which breaks west to be of hard red winter wheat and about 49 per cent as hard red spring wheat.

While we are on that point I want to call attention to the fact that the northwest and the southwest and the south-central area, as shown on Exhibit 2, produces only 3.1 million bushels of spring wheat mostly of low protein and some of it is produced under irrigation, whereas in [fol. 16] the northeast and the southeastern part of the state of Montana roughly 13 per cent is of the hard red winter and about 87 per cent is hard red spring.

This recapitulation also shows the production in terms of bushels, but I shan't go into that unless it is needed.

because there is a lot of detail involved and it is not necessary, it doesn't seem for the record.

Q. In that connection perhaps you had better explain the relative importance of the varieties of wheat to which you have referred and why it is important that your mills should be in a position to acquire the grain at the same rates as other mills.

A. Perhaps it is an over simplification to say that the protein content and the variety of wheat is closely related to the flour quality for commercial bread purposes; at the same protein level hard red spring wheat is distinctly superior to the flour quality for bread purposes produced from hard red winter wheat.

Q. And where is that wheat produced to the greatest extent in the state of Montana?

A. You will note from Exhibit 3 that approximately 34,000,000 bushels on the average for this six-year period was produced in the Southeast and the northern part of the state, predominantly in the northeastern part of the state.

Q. Now, that completes your explanation of Exhibit No. 3?

[fol. 17] A. Unless there is some question.

Q. Then will you take up Exhibit No. 4 and explain that?

A. Exhibit No. 4 is titled "Table Showing Relative Acreage and Production of Hard Red Spring and Hard Red Winter Wheat in Central and North Central Montana: Per Cent Each is of the Total". Now, may I ask you for orientation, if you would turn back to Exhibit 2, and which is the map, and it is about the finely dotted section that I will be referring to in this exhibit.

I mentioned a little earlier that it is in the north central and in the central area, which there is shown as the finely dotted area, that the Pacific Coast mills draw nearly all of their hard red spring and their hard red winter wheat for milling purposes.

The distinctive thing and the marked change that has taken place during these last six years, 1950-1956, has been in the sharp decline of the percentage of the hard red spring varieties and a corresponding increase in the production of hard red winter varieties. Now, this is in

two sections: The first shows the percentage of increase by harvested acreage; and the second section percentage of production in terms of bushels.

You will note that there has been a steady decline in the acreage from 1950 to 1955, from 69 per cent to 27 per cent. There has been a complimentary change in the pro- [fol. 18] duction of hard red winter from 31 to 73. Now, I should like to leave the aspect of the acreage and go next then to production because it is about production that we will probably be referring to most frequently. There is a little bit of difference there in the percentage figures and those come about through the relative yields of the winter and the spring wheat. You will note that the percentage of production of hard red spring has declined from 69 per cent in 1950 to 24 per cent in 1955, a corresponding increase in the hard red winter varieties from 31 per cent in 1950 up to 76 per cent in 1955. Now, this shift in production is primarily due to three things. There has been available to the Montana grower of the hard red winter varieties, of which very substantial winter hardiness. They can withstand winter kill and winter damage. The fall periods have been very favorable. The moisture at seeding time has been good. And number three, and probably most important of all, is that during this six-year period the average difference in yield per acre was 3.7 bushels in favor of winter over spring varieties, and that is roughly 21 per cent. Now, this 21 per cent incentive or advantage is overcome only partially through better prices being paid for the spring.

I think I may have mentioned it a little earlier but I would like to say it again if I overlooked it, that in this north central and central area, which is the finely dotted area, that the Milwaukee, according to reliable trade es- [fol. 19] timates originates 21 per cent of the wheat production and the Great Northern 79 per cent.

So far as the complainant is concerned, in earlier years we originated 35 to 52 per cent of our spring wheat requirements over the Milwaukee. In the 1953-56 crop year it was barely nine per cent. Under the circumstances we see no reason for expecting any change in the trend or the tendency for the winter wheat to replace the spring

wheat, and the spring wheat is being crowded into the most northerly counties and the higher protein spring or the spring of any kind is being concentrated along the high line of the Great Northern from Havre west to Shelby.

Q. And the point is that that makes it important that—

Mr. Tjossem (interrupting): Just a minute, Mr. Wettrick. I don't like to be objecting, Mr. Examiner, but I think it is obvious this is going to be a leading question. I think the counsel should be admonished not to lead the witness.

Exam. Boisseree: Well, I don't think counsel needs any admonishment. You make an objection to any question that comes up and the Examiner will rule on it.

By Mr. Wettrick:

Q. What is the significance you have just said so far as your complaint is concerned and the purpose of it?

A. Well, we are seeking competitive joint rates from Montana points on the Great Northern via our mills to [fol. 20] points in California and to points in Oregon south of Portland with a routing of Great Northern to Spokane, Union Pacific to Portland and thence S. P. and connections.

Q. And on what kind of wheat particularly?

A. We are concerned, as I think I have tried to bring out here, we are concerned and deeply concerned about the supply of the hard red spring wheats.

Q. And your Exhibit No. 4 shows that the acreage as well as the production of that has declined very substantially?

A. Very substantially, very severely.

Q. Have you explained what the trend has been as to the production area of the hard spring wheat.

A. Exhibit 4 is designed to bring out the shift that has taken place in the north central and the central area. Now, we rather quickly passed over in Exhibit No. 3, or No. 2, the fact that by and large the spring wheat is being produced without the inroad or the displacement of the hard red spring by the hard red winter in the northeastern

part of the state. It is still a substantially hard red spring producing area.

Q. Now will you go on with your next Exhibit No. 5?

A. Exhibit No. 5, Mr. Examiner, was introduced only to show what I have covered in Exhibit 5 in a graphic way. I don't know that it needs any explanation, that we need to take any time. What concerns us obviously here is that in the north central and in the central area of the [fol. 21] state the percentage of spring has declined from about 69 per cent down here to about 24 per cent, and there has been a complimentary change, of course, there in the winter wheat.

Q. Your map marked Exhibit 6?

A. Exhibit 6 is an outline map showing the five-year average from 1951 to 1955, inclusive, of the protein of each of the hard red spring and the hard red winter for the major producing counties of Montana. I don't know that it is necessary to go into any detail here. If I have overlooked up to now pointing out that the source of our information is the U. S. Department of Agriculture, I wish to make it clear now that in our production figures, our acreage figures, and even the figures from which Exhibit 6 are made were supplied and are billed to the public by the U. S. Department of Agriculture.

Just a few facts may be given about the protein of Montana. It is the highest producing area, it is the highest protein producing area, of any place in the North American Continent as a state or as a province. The five-year state average for the spring is 14.7 per cent protein content and the winter is 13.1 per cent protein.

Now, the highest protein spring in the north central and the central areas of Montana are produced largely along the line from Havre on the Great Northern west to Shelby. There are other packets of protein strength but that is the principal source.

[fol. 22] Now, this level of protein that we are speaking about in connection with hard red spring is used extensively by the commercial bakeries in the production of commercial grades of flour, and where we find a relatively high protein level, such as we find in Montana, where the protein level is of the highest we are bound to find some

of 15 to 17 per cent protein, which is used for some specialty purposes.

I want to bring out one thing that is important, and I would like to refer to my own note here, if I may. Due to climatical conditions—now, this is still referring to Exhibit No. 6—in the month of July and a part of the month of August in 1955, the rains throughout the central third of Montana were especially heavy, and whatever the cause the protein level of the spring and of the winter and especially the hard red spring in the areas where we normally draw our wheat almost fell out of bed, if I can use the expression, and it was necessary for the complainant mill, ourselves, along with the other Pacific Coast mills to go into the northeastern part of the state to originate nearly all of the spring wheat that we required, and this was done at great penalties or at transportation penalties ranging from five to twenty-six cents a bushel. A rough estimate of the average of freight penalty for all of the spring that we originated in the northeastern part of the state of Montana would probably be roughly fourteen cents a bushel.

Q. Did your mill obtain wheat in the northeastern section [fol. 23] shown on your map 6?

A. Practically all of the spring wheat, of that hard red spring wheat that we milled in the crop year 1955-'56, from July to June, was obtained in this northeastern part of the state.

Q. And for the reason you explained a moment ago?

A. That is right. Not only was the protein level lower but the gluten quality was in failure to normal levels.

Mr. Tjossem: What year was that?

The Witness: That was for the '55 crop, Mr. Tjossem.

By Mr. Wettrick:

Q. Does this map, Exhibit No. 6, indicate that the protein content of the hard spring wheat is generally substantially higher than that of the winter wheat?

A. Yes, sir. I might give you an example of the difference which applied in the crop year 1955-'56, which doesn't appear on your exhibit.

In the north central area the protein was 12.8 and the spring was 13.5 or a difference of seven-tenths of one per cent or higher in the case of spring.

In the central area the average protein level was 13 and the spring 14.4 or a difference of 1.4 per cent.

Q. And is that difference important in the milling business?

A. Yes, sir.

Q. Now explain Exhibit No. 7.

A. Exhibit No. 7 was made for the purpose of showing the production of wheat in the states of Washington and [fol. 24] Oregon and northern Idaho by classes. It is no surprise to you, but you will note that in 1955 that the white wheat made up the 89 per cent of the total production in the Pacific Northwest.

Q. And what kind of wheat is that?

A. It is what the trade expresses as common white or as white club and used for pastry and cake flours.

Q. It is a soft wheat, is it not?

A. It is a soft wheat and not suitable for bread purposes. The only other class that amounts to anything is the hard red winter, which you will note is 10.6. In Part B I have by the use of figures from the U. S. Department of Agriculture and Pacific Northwest Crop Improvement Association estimated practically close of the number of bushels produced in Washington, Oregon, and northern Idaho, for those several years, and you will notice that there has been a steady decline in the production of the hard red winter varieties because the white varieties were then and still are out yielding it. I have for information purposes shown opposite each crop year the protein content as established by the Pacific Northwest Section of the Association of Cereal Chemists, and you will note that the protein level has been less than 11 and generally in the high 9's and low 10's, a level which is not useful for the manufacture of bread flour, nor excepting for the choice areas is there any part of it which can be used for blending purposes. There are a few pockets here and there which are [fol. 25] 12 or higher protein, and those are used for some blend purposes, but, as you see, it is relatively small, and that is why we attach so much importance, as does all

Pacific Coast mills, Washington, Oregon, Utah, and California mills, to the Montana wheat crop. The fact is we are here on the Pacific Coast with the exception of a pocket of wheat down in northern Utah, southern Idaho, entirely dependent upon the Montana crop for bread, flour wheat.

Q. When you say the Montana wheat crop, you mean specifically the hard spring wheat?

A. Of both, but more and more emphasis is being placed upon the importance of the hard red spring wheat, as I think will be testified to later on.

Q. Mr. Mikkelsen, are you familiar with the decision of the Interstate Commerce Commission in the so-called Grain Case, Docket 17000, Part 7?

A. I am.

Q. What rate did the Commission fix in that case from this central Montana territory to North Pacific Coast terminals?

A. Thirty-nine cents, which is now seventy-two cents, including increases.

Q. And that 39-cent rate and the 72-cent rate, to which it has now been increased, does that apply over the route of the Great Northern to Spokane and the Union Pacific to Portland?

A. Yes, it does.

[fol. 26] Q. And that is the route that serves your mills?

A. That is right.

Q. And do you have transit privileges on that rate at your mills?

A. Yes.

Q. So that in that respect are you on the same basis as other mills in the Pacific Northwest, mills in Seattle and Spokane?

A. So far as Portland is concerned.

Q. Now, what rate did the Commission fix in the grain case from the central Montana territory to California?

A. Sixty-five cents, which has now been increased to one dollar eighteen and a half with the increases.

Q. And over what routes did the Commission direct that that rate be applied?

A. They directed that it be applied over the Butte gateway as well as a longer route through the Washington and Oregon routes.

Q. Through Washington and Oregon gateways?
A. Yes.
Q. To California?
A. Yes.
Q. As well as over the route through Butte?
A. That is right.
Q. And those rates were established accordingly and are in effect now, are they not?
A. Yes, sir.
Q. Was that rate applied over the route that serves your mills?
[fol. 27] A. No, it was not.
Q. What rate do you have to pay if you originate grain on the Great Northern and mill it into flour at your mills and ship it to Portland and then Southern Pacific beyond, what rate applies to your shipments?
A. To California, that is, to San Francisco, it is a rate of $1.49, which is composed of the 72-cent rate from Chester to Portland by our mills, and 77 cents beyond.
Q. Yes. What I had in mind there, because the exhibit later will show that, if you ship over that route, you have to pay the combination rates on Portland, do you not?
A. That is right.
Q. And the situation thus brought about is illustrated by your next exhibit, is it not?
A. Yes.
Q. Will you take that and explain it?

Mr. Wettrick: Incidentally, I notice that inadvertently the I.C.C. numbers of the tariffs referred to are not shown, and I would suggest to those present here that they just note on the exhibit somewhere that Tariff 241-E is I.C.C. No. 1577, which is referred to several times.

And N.P.C.F.B. Tariff 13-E is I.C.C. No. 888.

The exhibit also refers to some transit tariffs which are not important except that, as has been stated, the Union Pacific grants transit on the route in question in its Tariff [fol. 28] 7092-D, which is I.C.C. No. 5114.

By Mr. Wettrick:

Q. Now, will you go ahead and explain that exhibit, Mr. Mikkelsen?

A. This is a brief table here showing the rate structure that applies for Montana wheat via our plants, via our milling locations with Seattle and Butte gateways for comparison. The joint rate from Chester, Montana, in the first item, via Seattle to gates San Francisco and Los Angeles is now with the increases $1.18½ cents per hundredweight.

Chester, Montana, and others in the groups in the North Coast groups, of one seven eight and one seven nine via Butte and mill at Ogden is one dollar eighteen and a half cents to each, Los Angeles and to San Francisco.

The Milwaukee has established joint rates from Montana points to San Francisco and Los Angeles via our three milling points, and that is brought out in the third line or item 3 there, Great Falls, with their routing of Milwaukee to Spokane or Marengo.

Exam. Boisseree: Is that a comparatively recently established route?

The Witness: I don't know how long we have had it.

Exam. Boisseree: The only reason you said has established, when you mentioned that route I was wondering if that was recently established.

The Witness: We have had it for over 25 years, and I [fol. 29] don't know just when that was established.

Exam. Boisseree: It isn't important. I just picked up a difference in the way you described that route, and I was wondering if it was significant.

Will you continue, Mr. Witness.

A. That is a routing of Milwaukee to Spokane or Marengo, and thence Union Pacific to Portland and S. P. beyond, and that joint rate is one dollar eighteen and a half cents to each, San Francisco and Los Angeles.

As another example we have joint rates from Montana points on the N. P. to San Francisco and Los Angeles at the same level of one dollar eighteen and a half cents. We have given as our example here in item 4 Three Forks,

Montana, which is located on the N. P., with the routing N. P. to Portland and thence S. P.

The highlight of the exhibit, of course, we intend to bring out and do bring out, I believe, in the last item in which we show that there are combination rates to San Francisco and Los Angeles from Chester, Montana, with a routing of Great Northern to Spokane, then U. P. to Portland, and thence S. P., and is a combination made up of 72 cents from Chester up to our milling points and 77 cents beyond, in the case of San Francisco; in the case of Los Angeles it is 72 from Chester up to our milling points and $1.05 beyond, or a difference that we in the joint and combination rates of 30½ cents and 58½ cents for San Francisco and Los [fol. 30] Angeles, respectively.

By Mr. Wettrick:

Q. You stated that the rates from Chester, Montana, over the route that serves your mills are the combination on Portland and they grade up as you go south from Portland, do they not?

A. That is right.

Q. So that the combination at San Francisco is $1.49 and at Los Angeles $1.77 compared with what rate that is available to other millers?

A. One dollar eighteen cents and a half.

Q. And that applies over all the routes you have shown—

A. Yes, sir.

Q. (Continuing) —except the one via your mills?

A. That is right.

Q. What is the situation with regard to the rates to the territory south of Portland, and you might say intermediate to the territory in California from which the rates are blanketed at $1.18½ to the southern part of the state?

A. Would you please turn to Exhibit No. 9. This is a statement showing the difference between joint rates and combination rates on wheat and wheat flour from Chester, Montana, to some northern California points and points in Oregon and south of Portland. It was made up to show how the combination rates that we are required to pay on Chester, Montana, origin compare with the joint rates that [fol. 31] are available to our competitors. You will notice

that in the case of Salem the difference is seven cents per hundredweight, and these are differences after the increases under Ex Parte 175 and 196; Albany is eight cents, and this points out that the joint rates shade into $1.18½ at Dunsmuir, California, whereas our combination rates would only get us a little past Klamath Falls, Oregon.

Exam. Boisseree: Mr. Wettrick, is this a good point to take a recess?

Mr. Wettrick: Yes, sir.

Exam. Boisseree: We will take a 10-minute recess.

(Short recess.)

Exam. Boisseree: On the record.

By Mr. Wettrick:

Q. Mr. Mikkelsen, will you take up Exhibit No. 10 and explain it?

A. Exhibit No. 10 simply is a statement showing the distances and routes from Chester, Montana, to San Francisco and to Los Angeles, California. I think all that needs to be pointed out here is that the route from Great Northern points, such as Chester, to San Francisco and to Los Angeles via our milling points will be slightly less than the shorter tariff route through Seattle. I have an asterisk there indicating that the longest tariff route to San Francisco via Seattle is 1,850 and to Los Angeles is 2,273. We have only shown the shortest tariff route here, the distance via our mills, as I have said, are somewhat shorter. [fol. 32], Q. And the longest routes that you mentioned there, the longest route that you mentioned there, is which one?

A. It is the route from Chester, Montana, to Vancouver, Washington, by Great Northern, S. P. & S. to Wishram, Oregon Trunk to Bend, Great Northern to Bieber, Western Pacific and Southern Pacific.

Q. Does the rate that has been mentioned of one dollar eighteen and one half cents to California apply from Portland south over all of these Great Northern routes shown on your Exhibit No. 10?

A. They do.

Q. How much shorter is the route via your mills to San Francisco and Los Angeles than this longest route that you have specified here?

A. They are shorter by 213 miles to San Francisco destination and 264 miles to Los Angeles.

Q. And I think you stated that the route via your mills is shorter than any of the other routes shown?

A. Excepting Butte.

Q. Excepting Butte, that is, the routes from Chester through Butte to California?

A. Yes.

Q. In that connection can you state what the distance is from Chester, Montana, as a representative point to Spokane?

A. We show it as 469 miles.

Q. And what is the distance from Chester to Butte?

[fol. 33] A. It is 313 miles or a difference of 156 miles, which is less to Butte than to Spokane.

Q. Now, what is the significance of that, so that I don't ask you a leading question?

A. Well, the Commission believe, according to the grain rate case, that the rates should apply over the Butte gateway as well as over the longer routes through Washington and Oregon.

Q. What I have in mind is, Mr. Mikkelsen, the figures you have given indicate, do they not, that the Great Northern gets a haul 156 miles longer if the traffic moves via the Spokane gateway than it does if it moves via the Butte gateway, isn't that correct?

A. That is right, where we are taking the wheat from Chester.

Q. Yes. And you mentioned Chester as a representative point?

A. Yes.

Q. So that if for you to get the joint rates that you want should result in any more traffic moving from Great Northern Points via your mills than at the present time the Great Northern would get a longer haul on it than they would if it moved via Butte and Ogden, would they not?

A. Yes, sir.

Q. Now, this exhibit indicates, does it not, that the Great Northern has numerous authorized routes beyond Portland to points in California, does it not?

A. And also between Spokane and Portland.

[fol. 34] Q. And that means that the traffic could move south of Portland over routes of the Great Northern as well as the Southern Pacific, if a joint rate were established, the same as other mills have?

A. Yes, sir.

Q. And in that connection, if the service over the Great Northern routes from Portland south, is satisfactory, is there any reason why you shouldn't use their service as well as that of the Southern Pacific?

A. There is no reason why we would not.

Q. And if you did, the Great Northern would get a haul on your traffic beyond Portland, would it not?

A. To Bieber.

Q. As far as Bieber is concerned where the traffic would be turned over to the Western Pacific to destination?

A. Yes, sir.

Q. Now take up Exhibit No. 11 and explain it.

A. I think Exhibit No. 11 is also self-explanatory. It shows the annual flour production according to the Bureau of Census for the crop, crop years indicated for the four states of Washington, Oregon, Utah, and California. There is no particular significance to the exhibit excepting to point out there has been some changes in the relative production of the states, partly due to one circumstance, partly due to another. As you will note, Washington has been [fol. 35] plopping around, their current production is just barely hanging on, Oregon has shown a slight increase, but both Utah and California have shown a steady increase since 1946, the end of the war. I don't think it is necessary or even pertinent to go into the reasons for those at this time.

Q. Very well, then go to Exhibit No. 12.

A. No. 12, as you say, the title is "Statement Showing For the States Indicated the Population, Estimated Flour Production Capacity and the Annual Surplus or Deficit of Capacity Relative to Estimated Flour Consumption". Now,

in column 1, or rather opposite the respective states has the population here as of July 1 of 1955, the estimated flour consumption is the national average of 121.3 pounds per capita. The next column is the annual flour production capacity, which is the daily capacity of the operating mills in these four states, multiplied by 300 working days. The difference between the estimated flour consumption, assuming that each of these four states consume as much flour as the national average, which they may or may not do, then for California there is a milling capacity deficit of approximately nine and one-half million hundredweight, but the surplus, of course, showing heavily for Oregon, Washington, and Utah.

Q. And that indicates the importance of California as a market for flour?

A. That is right.

[fol. 36] Q. Now what about Exhibit 13?

A. Exhibit 13 is almost a companion to Exhibit 12, not necessarily a companion, but in trying to think about the size of the California flour market one can use any number of approaches or figures in trying to establish the size of the market down there. They can do it by Exhibit 12 or we can do it by Exhibit 13. Somewhere in-between probably is the answer. Exhibit No. 13 shows the total rail terminations and origins of flour in California for the calendar years as indicated. The sources of this information are the annual reports to California Public Utilities Commission. And by using Exhibit 12 and Exhibit 13 the indicated California flour importation is somewhere between 3.3 million and 9.5 million hundredweight per year.

Q. 3.3 million?

A. 8.3 to 9.5 million hundredweight.

Exam. Boisseree: I think you mis-spoke yourself, Mr. Mikkelsen.

Would you ask him another question, Mr. Wettrick to clear it up? Has he cleared it up now by that last figure?

Mr. Wettrick: Yes, I think so, if the lady here got it right.

By Mr. Wettrick:

Q. That had reference to the deficit in California?

A. That is right. In other words, the amount of flour that California imports currently from out of state.

[fol. 37] Q. And what you said there is that that very likely lies between the deficit shown on Exhibit 12 for California and the last figure shown on Exhibit 13, is that correct?

A. Yes, sir.

Q. All right, let's take the next exhibit.

A. This Exhibit 14, of course, as the title indicates show the civilian growth in California, Washington, and Oregon for the periods indicated, that is, July 1, 1940, to July 1, 1955. I think it is self-explanatory.

Q. It is offered for what it may be worth?

A. Yes, that is right.

Q. Exhibit No. 15.

A. Exhibit No. 15 is titled "Statement Showing Volume of Flour Sold to California Destinations and Those Sales Expressed as Percentages of Total Flour Sold By Complainant annually for the Period 1951-'52 to 1955-'56, Inclusive", and these are in 1,000 hundredweights. As you will see, there are sales to California have ranged from about nine hundred thousand hundredweights to about one million hundredweights per year during these five years. The percentage of our California sales to our total sales ranges from 63 to 75 per cent, showing the importance of the California sales to us, and we are not Johnny-come-latelies in that market. The Preston-Shaffer Milling Co. has been in that market for years, for more than 30 years.

[fol. 38] Q. In connection with that exhibit, Mr. Mikkelsen, which probably seems rather startling to some people, it indicates that California is the principal market for flour of your mills, does it not?

A. Yes, sir.

Q. And that means what kind of flour?

A. Practically all bread flour.

Q. Made from what kind of wheat?

A. It is made from hard wheat, hard red spring wheat from Montana making up a substantial part of the blend.

Q. Is the hard red spring wheat produced in Montana—

A. (Interrupting) It is produced—

Q. (Interrupting) Wait. I mean is it indispensable to the flour production of your mills?

A. It is indispensable.

Q. If you are going to continue to sell your flour in California, is that correct?

A. That is right.

Q. It is indispensable if you are going to continue to sell your flour in California in competition with other mills?

A. Yes, sir.

Q. Now, you started to say a moment ago that you hadn't appeared on the scene just yesterday so far as this California market, supplying to the California market is concerned, you expressed it another way, but what did you [fol. 39] mean by that, will explain what you said in that respect?

A. I think later testimony could amplify that, but complainant—

Q. (Interrupting) I meant with reference to your following the exhibits here.

A. Yes. I would say this in a general way, I don't have anything before me nor over here in Seattle to substantiate it, but the sales of the complainant mill to California are higher in percentage of the total sales of any other Northwest mill—no—of the other north—let me start again.

The percentage of our sales to California, both north and south, are heavier percentagewise than the general average percentage of the sales of other Pacific Northwest mills to California as compared to their total sales.

Q. Let me express it this way, to see if I understand you: You sell a greater proportion of your flour output in California than other mills in the Pacific Northwest? Is that what you mean?

A. I don't know how they would compare currently. We do know that in the period prior to 1947 and 1948, that the percentage of our sales to California of our total sales were heavier than the percentage of the sales to California by the other Pacific Northwest mills compared to their total sales.

Q. Does that include the mills in Utah also.

A. Just for Oregon-Washington.

Q. Indicating that California is your principal market?

[fol. 40] A. That is right.

Q. And has been for years, you indicated, didn't you?

A. That is right.

Q. Will you take up the exhibit which relate to that, No. 16?

A. Exhibit 16, it may be asked why, why we were able to get into California with the use of Great Northern wheat. Actually when we made up this Exhibit 16 it was not known at that time whether it would be used as an exhibit, but more as information for ourselves and to provide a background because it only compares some periods, not the entire period.

The title of it is this: "Statement Showing Comparison of Cost of Transportation of Wheat and Wheat Flour From Chester, Montana, to San Francisco and Los Angeles For Some Representative Periods", then you will notice section 1 reads: "Rail-water compared to all-rail." Now, before the shipping space became scarce in the spring of 1941, our rail-water cost of transportation to San Francisco and to Los Angeles was less than the all-rail from Chester to San Francisco and Los Angeles, and the rail-water charges include the applicable dark charges including loading into cars. This was after the Commission provided for the Butte gateway effective July 1, 1935.

The importance of the water movement to California will be brought out in the next or a very near exhibit.

I think there probably needs no more explanation, I mean of this section of the exhibit.

[fol. 41] In Section 2 we have shown the port-to-port rates as compared to the through-rate tariff routes doesn't have too much meaning here, as at the present time about all that we need say is that it did give us an opportunity to get into a destination if we were short of the transit which would carry the flour there most economically, or if we were without it at all. But keeping in mind now that we were bringing Montana wheat into our mills in this period before water, coastwise water service ceased in the spring of 1951, that we were milling that wheat into

flour and transporting it to San Francisco and to Los Angeles, at not to exceed the all-rail rate.

I am sorry that I diverted a little bit there.

Section 3, joint rates compared to combination rates, is no more than we have already covered in an earlier exhibit.

Q. Let's go back a little bit there, Mr. Mikkelsen, when you say "port-to-port rate" there under section 2, you are talking about port-to-port rail rates?

A. That is right, yes.

Q. And they were the rates made to meet water competition which were abolished as a result of the I.C.C. docket that you mention there?

A. Yes, sir.

Q. Well, then, as I understand this exhibit here, it indicates that at the time mentioned you were able to compete in the California market, dispose of your flour there, [fol. 42] by using water rate from Portland to points in California?

A. Yes.

Q. And then later, after the steamships, the coastwise vessels disappeared and water transportation was no longer available, you relied on the low port-to-port rail rates to considerable extent until they also went by the board, isn't that correct?

A. We could use them, they were available to us if we needed them.

Q. Yes.

A. Under extreme circumstances. Obviously we couldn't compete by using those port-to-port rates when our competitors have 78 cents to each, San Francisco and to Los Angeles, and we had 83 and 86, respectively, but they were there in case we got into a jam. At that time we still had Milwaukee spring available to us, that is, hard red spring produced in the area served by the Milwaukee Line.

Q. And hence billing that would take you or your product to California at the rates which competing mills were paying? I mean when you had more shipments originating on the Milwaukee?

A. Yes, sir.

Q. Now, you indicated that has dwindled down to what, about nine per cent?

A. Last year after every possible effort was put forth we only originated nine per cent of our spring wheat on the Milwaukee Line.

[fol. 43] Q. Now to go back still farther, what does Exhibit 17 show?

A. Exhibit 17 illustrates the historical importance of the Washington and the Oregon mills in the California market, and I wish to call special attention to the relative amounts of flour that was imported into California by rail and by water, referring to the average for the 1926-1929 period. You will notice this incidentally is carried in barrels but only 84,000 barrels of flour was received in all of California, according to this particular study, and I consider it a classical study, as compared to 1,454,000 barrels that were imported by water, and this emphasizes what has taken place over the years in our competitive position which now is beginning to turn on the absence of the hard red spring on the Milwaukee Line. I don't think that I have any other comment to make about that, Mr. Wettrick.

Q. I wish you would enlarge upon the statement that you just made, that your business, your continuance, you might say, in the California market, hinges on your ability to get the hard spring Montana wheat.

Mr. Tjossem: Just a moment, Mr. Examiner, I have an objection to the question. Little leading, there have been lots of leading questions asked and I haven't objected, but I think that this again is putting testimony in the mouth of the witness and I object.

The Witness: That is not a leading question, Mr. Examiner.

[fol. 44] Exam. Boisseree: It is not that so much as far as the Examiner is concerned, Mr. Wettrick, but I think it is repetitious. I think it has been fully discussed by the witness in previous questions. Now, I don't want to start another line, I don't want him to make a restatement of what he has before. If there is some technical point that you want covered that has not been covered, why, you may cover that.

Mr. Wettrick: I really think you are right about it, Mr. Examiner.

Exam. Boisseree: It is my recollection he has gone into quite a bit of detail why they—

Mr. Wettrick: My purpose is to sort of summarize but that can be done in the brief or at another time, so we will let that part of it stand as it is, with the reservation, however, that I wouldn't agree that it was a leading question.

Exam. Boisseree: Well, as long as it is not going to be answered, I don't think Mr. Tjossem will—

By Mr. Wettrick:

Q. Now, you have another exhibit, No. 18.

A. Yes. This exhibit was developed for the purpose of answering the question that will occur to Examiner Boisseree and to the defendant as to how we disposed of our almost unusable Great Northern transit.

Q. And defendant's attorney, too?

A. Yes, sir. This table is a statement showing the amount of Montana Great Northern billing applied by shipments [fol. 45] of flour and during the period July 1, 1955, to June 30, 1956. We used just one crop year.

You will notice in the first line that we applied Great Northern billing to flour and feed to domestic destinations. Obviously that would have to be Portland or to points taking combinations over Portland, and that amounted to roughly 37,000,000 pounds.

On line 2 we have applied to North Pacific port destinations in the case of flour shipments about 9,000,000 pounds.

We applied to domestic and North Pacific port destinations for wheat of almost 9,000,000 pounds.

Or making a total of about 55,000,000 pounds which is the rough equivalent of 918,000 bushels of Montana wheat. We brought that off of Montana by Great Northern lines, we had to utilize it, and that is how we utilized it. We bring that into the record to answer the question as to since you were only able to buy roughly nine per cent of our wheat on the Milwaukee, then what did you do

with the Great Northern transit if you maintained your flour quality, which we did, and this is it.

As you know, applying Great Northern transit beyond Portland is prohibited.

By Mr. Wettrick:

Q. Explain that, why it is prohibitive.

A. The rate from Chester, Montana, via our mills to, say, Eugene, Oregon, or call it Salem, back on Exhibit 9, [fol. 46] or to Albany, or to any of the other Oregon points south of Portland, that we had to pay the local rate over Portland on the flour and the mill feed, and we calculate, we not only calculate, we computed that we billed to Oregon and Washington destinations flour and mill feed on 7,930,430 pounds at a cost of $6,338.76.

Q. During what period?

A. For the crop year 1955 and '56. That is from June 1 to June 30, which we would not have had to pay if we had had joint rates or had been in the position of our competitors who do have joint rates. That is one of the measurable costs. There were costs that we can not measure.

We have also reverted to other ways of meeting our problem. We leased space at Spokane during this last crop year from July 1 to July 30, and we moved through a Spokane elevator about 250,000 bushels—I have the figures here—and it was stored there but when the elevator company shipped it out they applied, not the inbound billing from Great Northern points, such as Chester, but they applied the billing originating, say, at Colfax, Washington, or Pullman, Washington. The differences in the transit costs were just simply a bookkeeping arrangement. Of that we calculated costs us almost $10,000. We used it primarily for a point of storage, it is true, but this doesn't include the storage charges.

Q. Is it your statement that that was done in order to avoid your mills having to pay the higher combination [fol. 47] rates on traffic to California?

A. It permitted us to be relieved of that much Great Northern transit that could only be dead at Portland, in

lieu of which we obtained some transit that we could get into northern California.

Q. At the same rates as—

A. At reasonable or economical rates and no higher than they would have been if we had taken it off the Milwaukee at Great Falls or Three Forks on the N. P.

Q. Well, that means that in these two instances that you have mentioned here you have actually suffered during the last crop year ending at June 30, 1956, a measurable damage or cost, as you refer to it, of practically $16,000, is that correct.

A. That is the measurable cost of that as only a part of it.

Q. I was going to approach the subject that you are now on in a somewhat different way and end up with the figures you have given by asking you how it has been possible for your mills to remain in the California market or to hold your business there under the, as your figures indicate you apparently have, on the rate adjustment which exists and of which we are explaining. Now, you have indicated that you built up the market down there through water rates in the first place. Will you explain in considerable detail how you have been able to do that?

A. I can begin by saying that so long as we had Milwaukee hard red spring available to us, that took care of [fol. 48] the entire California market. As the supply of the hard red spring on the Milwaukee began to shrink, then we had to be sure and limit our sales to southern California to the extent that we had Montana origin Milwaukee and N. P. billing. Now, we have come to the point of where we have to decide whether we can sell into southern California at all or not. We are limited by the amount of the Milwaukee-Montana-Milwaukee that is, and the Montana N. P. billing that is available to us.

Q. Now, do you mean by that that under present conditions you can dispose of your flour in southern California only to the extent that you can originate the hard spring wheat on the Milwaukee and the Northern Pacific Railroad?

A. Not entirely but substantially so.

Q. Now what part of California are you referring to, say, from Stockton south?

A. Stockton, San Jose south as being described generally as southern California.

Q. How do you serve the territory north thereof in northern California?

A. We serve that by the use of transit billing originating in eastern Washington, taking a long rate to Portland, which gives us a favorable balance to pay from Portland—I didn't mean to get into that. I only simply want to say that the transit that we use to get into northern California is that of eastern Washington and northern Idaho plus [fol. 49] what excess we have had in some earlier years, not now but some earlier years from the Northern Pacific and the Milwaukee.

I think it is only fair to say that we do this—

Q. (Interrupting) I was going to say the short answer to what you have just said is that it is done through the substitution or the switching of billing, isn't it?

A. It is. And I was about to say that one example that might illustrate it better than anything else is what we do from time to time to what we call dump the G. N. transit, and that is what it means to us, and to substitute something usable for it, that we will make some flour at, say, the Waitsburg plant, with a sales destination of Portland. We will be making wholewheat flour at the Waitsburg plant with the sales destination of San Francisco. And we will switch the transit at Waitsburg. But those are limiting things. Those are things which limit our business and which restrict us. There are times when we have to operate our business too much on the basis have we the proper billing to get the destination, can we sell flour to certain customers and certain destinations, can we get the wheat.

Q. And that depends upon whether you have billing that will enable you to ship the flour to California and overcome—in that way overcome the payment of the combination rates, does it not?

A. That is right.

[fol. 50] Q. That is a long and a difficult story, isn't it?

A. It certainly is.

Q. In your position with the company do you deal with that question from day to day?

A. Yes, sir.

Q. How much of your time does it take to figure out how you can get around having to pay the joint through rate that other mills pay and to avoid the combination that is available to you?

A. I don't know that I can estimate it, but it is much too much.

Q. Does it also involve others of your officials?

A. Of the sales department, Mr. Welk, and Mr. Welk.

Q. When you get an order for flour or are considering a sale in California, do you first have to consider whether you are going to be able through the switching of billing to deliver that flour at the same transportation cost as your competing mills in the Northwest can do it?

A. We do.

Q. And that always involves a number of uncertain things, does it not?

A. That is right. And, as Mr. Welk, I am sure, is going to testify later, that we are as quality conscious and the competitive factor for the sale of flour to the preferred customers along the Pacific Coast requires a preferred quality of wheat, and we do not sacrifice it, and we get along as best we can with the transit that we have.

[fol. 51] Exam. Boisseree: Is this a convenient place to stop, Mr. Wettrick?

Mr. Wettrick: It is.

Exam. Boisseree: We will recess now until 1:45.

(Whereupon at 12:10 p.m., a recess was taken until 1:45 p.m. of the same day.)

[fol. 52] AFTERNOON SESSION

1:45 p.m.

Exam. Boisseree: We are ready to resume, gentlemen. Mr. Wettrick, before you go forward, I think Mr. Fuller has a statement he indicated he wanted to make for the record.

Mr. Fuller: Yes, Mr. Examiner, during the noon recess I had occasion to check further with my people, and also in conferring with counsel for the rail here, I believe what I have to say for this record perhaps had better be put in as a statement, acting as a witness, and with that in mind I would ask permission to allow me to withdraw my request for formal petition of intervention.

Exam. Boisseree: Do you have any objection to that procedure?

Mr. Wettrick: Does that mean as a witness for the defendants?

Mr. Fuller: Yes.

Exam. Boisseree: I assume you have none either.

Mr. Tjossem: Nose.

Exam. Boisseree: Your request will be granted and your petition of intervention will be considered withdrawn.

Will you go forward now, Mr. Wettrick.

WALTER C. MIKKELSEN resumed his testimony as follows:

Direct examinaton (continued).

By Mr. Wettrick:

Q. Mr. Mikkelsen, you referred to the fact that you shipped during the last crop year rather substantial quantities of mill feed, and I think you said some flour, to points [fol. 53] in Oregon, south of Portland, on which you paid the combination rates on Portland.

A. Yes, sir.

Q. And you stated how much that cost you in dollars and cents over what it would have been if you had had joint rates on the same basis as other mills. How did that traffic move from point of origin and your mills to the territory south of Portland? Did it move on through bills of lading?

A. On through bills of lading.

Q. And exactly the same as it would have if you had had joint rates?

A. The same.

Q. What rates were paid on it?

A. Local over Portland.

Q. In like example is that route via Portland presently open for shipments of your products to confine it to that at the combination of rates on Portland?

A. Would you state the question again, Mr. Wettrick?

Exam. Boisseree: The reporter will read the question.

Mr. Wettrick: Will you read it?

(Question read.)

A. Yes.

By Mr. Wettrick:

Q. So that the only difference is that as between you and other mills in that respect that you have to pay the combination rates while they pay the joint rate that you [fol. 54] claim you ought to be entitled to use?

A. That is correct.

Q. Would it be in the public interest for your mills to be permitted to transfer on the joint rates as other mills do?

Mr. Tjossem: That is objected to as asking for a conclusion and asking for a statement of opinion on an issue that is involved in this case in which of necessity must be presented to the Interstate Commerce Commission for decision.

Exam. Boisseree: The objection is sustained.

Mr. Wettrick: Then I am going to reframe my question and ask him frankly:

By Mr. Wettrick:

Q. Whether in your opinion, based on your experience, it would be in the public interest for you to have the same joint through rates as other mills have in the Pacific Northwest.

Mr. Tjossem: Same objection.

Exam. Boisseree: Sorry, Mr. Wettrick, the same ruling.

Mr. Wettrick: All right.

By Mr. Wettrick:

Q. Would it increase the competition in the growing of grain in the territory of origin, the competition in the buying of grain in the territory of origin in Montana, if you were put on the same basis as other mills are?

Mr. Tjossem: I object to the question with respect to the growing of grain in Montana, as there is no proper foundation for this witness to know.

[fol. 55] Exam. Boisseree: Well, my understanding of the question was as to the buying and selling of grain.

Mr. Tjossem: He said the growing of grain.

Would you read the question again, Mr. Reporter?

Exam. Boisseree: I don't see how competition in the growing of grain—it wouldn't make sense.

The Witness: I think I mistakenly said growing and then changed it to buying, didn't I?

Exam. Boisseree: You mean the marketing of grain, is that what you mean, Mr. Wettrick?

Mr. Wettrick: I mean first upon the territory of origin where the grain is bought.

By Mr. Wettrick:

Q. What effect would it have if you were free to buy the grain in Montana in the same way as other mills do and on the same rate basis?

A. It should and would increase the competition for the wheat to the benefit of the Montana wheat grower.

Q. Would it also have an effect upon the marketing of the grain in the destination territo y?

A. It should broaden the basis of supply of the flour imported by California bakeries and consumers and therefore be for the benefit of the California consumers.

Q. Let me ask you this, Mr. Mikkelsen, in view of what you have testified or otherwise, for that matter, is present rail transportation adequate so far as your mills are concerned?

[fol. 56] A. Not so far as our mills are concerned for the reasons that we have recounted this morning.

Mr. Tjossem: Sorry, I didn't get that last word. For the reasons—

The Witness: For the reasons that were recited this morning.

By Mr. Wettrick:

Q. Is transportation via your mills adequate for your purpose, for the purpose of your mills, unless the rates are on the same basis as those enjoyed by other mills?

A. They are not.

Q. Are reasonable through routes and joint rates over the route in question necessary to provide adequate transportation for your mills?

Mr. Tjossem: Just a moment. I object to that again because I think that that asks for a legal conclusion. I don't think there is anything factual about the question. It is opinion, and the statute says that these routes may be prescribed by the Commission if the present routes are not reasonably adequate or economic.

Exam. Boisseree: His answer is necessarily confined to his own company and the objection is overruled. To his own company, and it may or may not be in the entire public sense. The question as I understood it, and the answer was restricted to the complainant mills.

Mr. Wettrick: I think there will be no question about the propriety of the next question I want to ask you which is:

[fol. 57] By Mr. Wettrick:

Q. Whether the establishment of reasonable joint rates, and by that I mean the joint rates as the Commission fixed in the grain rate case and as the other mills enjoy, would provide more economical transportation for your mills.

A. They would.

Q. Would it substantially reduce the costs of transportation for your mills, let's say, in instances where you can't by this difficult process of switching billing obtain the benefit of the lower through rates?

The Witness: May I ask that you read the question?

Exam. Boisseree: You sort of lost me, too, Mr. Wettrick.

Would you read the question back?

Mr. Wettrick: Just strike that.

Exam. Boisseree: Do you want it stricken? I think it is all right, when you just stopped there, why—

Read it back.

(Question read.)

A. It would.

Mr. Wettrick: I probably should have added there, to have these joint rates, but I think it is apparent what I intended to bring out in that connection.

I think with that, Mr. Examiner, I will offer in evidence Exhibits 1 to 18, inclusive, submitted and explained by this witness and ask that they be received.

Exam. Boisseree: Is there any objection to the receipt of [fol. 58] those exhibits?

Mr. Tjossem: No objection.

Exam. Boisseree: Exhibits marked for identification Nos. 1 to 18, inclusive, are received in evidence.

(Complainant's Exhibits Nos. 1 to 18, inclusive, Witness Mikkelsen, were received in evidence.)

Exam. Boisseree: I take it the witness is now tendered for cross-examination.

Mr. Wettrick: Yes.

Exam. Boisseree: Will you proceed.

Cross examination.

By Mr. Tjossem:

Q. You say, Mr. Mikkelsen, you have been with this company for some twenty-five years. Do you know when these mills were built?

A. The mill at Waitsburg was built—

Mr. Wettrick (interruption): Mr. Examiner, could we save this if I state that Mr. Welk, the president of the company, will mention those facts in his testimony?

Exam. Boisseree: Mr. Tjossem?

Mr. Tjossem: That is agreeable.

By Mr. Tjossem

Q. Would you look at your Exhibit No. 2, Mr. Mikkelsen?

A. Yes, sir.

Q. Now, the area you show on Exhibit No. 2, which you described as the small dotted area, that encompasses a con-
[fol. 59] siderably larger area than the so-called triangle that you explain about in your complaint, does it not?

A. I'd like to answer that by saying that this so-called north central and the central area which is shaded by the finely close dots is the area where we normally, along with other pacific coast mills secure the hard red spring and hard red winter. This was shaded in this way to bring out the later point, that there has been a very sharp shift in the production of hard red spring or, rather, of hard red winter at the expense of hard red spring. It includes more than the triangle, it is true.

Q. Well, referring to paragraph 4 of the complaint, as I read it, you have a legend there that the purpose of this complaint is to bring about the establishment of reasonable and non-prejudice rates for the transportation of wheat and its products in carloads from main and branch line points of the Great Northern in the State of Montana east and south of Cut Bank, along Cut Bank and points in the so-called triangle territory to California and points in Oregon south of Portland, is that as you recall the allegation of the complaint?

A. Yes, sir.

Q. Will you tell me what you mean by the so-called triangle country?

A. The triangle country is that area encompassed by the points of Havre west to Shelby, south to Great Falls, and
[fol. 60] its branches. Strictly perhaps, the triangle would be just three sides of a triangle, but in the grain rate case it was prescribed as the Great Northern route from Shelby to Havre, south to Great Falls and the branches, and then in connection with the Northern Pacific and the Milwaukee, certain other points which are embraced in these groups 178 and 179.

Q. You were referring to groups 178 and 179, where are they mentioned?

A. They are not mentioned on this exhibit.

Q. Those are rate groupings of the tariff that you are mentioning?

A. Yes, sir.

Q. Do I understand, then, by the triangle you mean the area encompassed by the Great Northern line starting at Shelby on the west, Great Falls at the south, and Havre on the east, is that what you mean by the triangle?

A. Well, I don't think, Mr. Tjossem, that I referred anytime to the triangle territory.

Q. The complaint does, that is what I was pointing out to you. Your complaint of the rates in the so-called triangle territory.

A. Well, that is a general term, Mr. Tjossem, meaning several things to different people. Now, the grain to grain buyers when they talk about the triangle and the Judith Basin, it encompasses all of the area in the north central and in the central area.

[fol. 61] Mr. Wettrick: Mr. Examiner, I prepared the complaint. Could I be permitted at this point to state what is meant by it?

Exam. Boisseree: I think it should be.

Mr. Wettrick: The triangle has acquired a rather well known meaning as a result of several cases that have been before the Commission in which the rates from that territory were involved, and it was also referred to as such in the grain case. In this case we complain not only about the rates from so-called triangle territory but from all of the territory reached by the Great Northern east of Cut Bank, including branch lines of the Great Northern extending from the main line, and so that there would be no question about it I added, "including the so-called triangle territory".

Mr. Tjossem: I am just asking this witness what he understood the complaint to be, Mr. Wettrick, and I think I have a right to ask him what he understands the issue to be. I think he has answered me.

Exam. Boisseree: All right, we are all squared away now. Let's continue with the cross examination.

By Mr. Tjossem:

Q. As I recall, you testified according to what you described as reliable trade estimates of the hard spring wheat, 79 per cent would be available on the Great Northern and 21 per cent on the Milwaukee, is that your testimony?

A. I testified that according to reliable trade estimates [fol. 62] that of all of the wheat produced in the north central and in the central area 21 per cent was estimated to be served by the Milwaukee and the 79 per cent by the Great Northern.

Q. What period does that cover?

A. It covers the period from 1950 to 1955, inclusive, a six-year average.

Q. It does not purport to cover the future, except as the future might be gauged by the past.

A. It covers the period referred to.

Q. And that is of 1950-'55 period?

A. That is right.

Q. Now, when you say north central and central, is that the area shown on Exhibit 2 in the small dot?

A. Yes, sir.

Q. And when you refer to the southwest and northwest area, where is that shown in Exhibit 2?

A. The north to northwest would include the western part of the State of Montana from the western boundary to approximately the summit of the main Rocky Mountain range over to the Idaho boundary. That would be the northwest.

Q. Simply stated on the left-hand side of the area of Montana shown on Exhibit 2 there is no marking in that area, it is plain white, isn't it?

A. That is right.

Q. It is divided by a blue line?

[fol. 63] A. That is right.

Q. And in the area north of the blue line is what you call the northwest and the plain area south of the blue line is what you call the south area?

A. Yes, sir.

Q. Then the small dotted area, the portion north of the blue line is what you call the north central?

A. Yes, sir.

Q. And the remaining dotted area is what you call the central?

A. Central.

Q. Is the south central the uncolored area lying immediately south of the central area?

A. Yes, sir.

Q. And then your southeast and northeast—the northeast is a hatched area and the southeast is the unmarked area lying east of the blue line marking the east boundary of the north central and central area?

A. Yes, sir. I might say that as a matter of record that the official figures from the U. S. Department of Agriculture were adjusted by the official U.S.D.A. figures in order to arrive here at that part of the state which would flow east or flow west.

Mr. Wettrick: On the basis of the rates?

The Witness: Of the rate structure.

By Mr. Tjossem:

Q. Do you know how they gathered this information that [fol. 64] you show here, how they went about it, whether they got this from elevator reports or from the farmers themselves or how they got this information?

A. Mr. Tjossem, it has never been clear to me how they construct their final estimates, but it is through a combination and mostly relying upon the information furnished by farmers.

Q. All you did was to take this information that you filed here as your source and you just accepted that as being correct without any further investigation?

A. Because that is the official U.S.D.A. and is incorporated in the Washington figures.

Q. How are these reliable trade estimates made?

A. It is an estimate given to us by the shippers over there on the basis of how they feel the wheat in the north central and central area flows to the Milwaukee line and to the Great Northern line.

Q. Who is "they" to give it to you?

A. I don't know that I can divulge the source of that information, Mr. Tjossem. They are reliable and it is a composite.

Q. Did it come to you through some reporting agency?

A. No.

Q. You mean you go over there and get it from the farmers themselves?

A. This is private, private trade, of the elevator operators.

Q. Of what, the Pacific Northwest and Montana?

[fol. 65] A. Montana elevator operators.

Q. And they make up some kind of composite report that is given to you?

A. Oh, they know, they know, for example, Mr. Tjossem, let's say Stanford, Montana, at Havre, how many carloads of wheat are originated there every calendar year, and that goes on substantially substantial for this entire year.

Q. And that's made available to you?

A. It isn't made available to us; it is made available to them, and they have given it to us as an estimate only. It was introduced as something to think on, and we believe it is reliable.

Q. But you don't care to divulge the source of your information?

A. No, sir.

Exam. Boisseree: Any more than you have already done so? I think you have indicated that it comes from the elevator operators in Montana.

The Witness: Yes.

Exam. Boisseree: The answer to your last question is you don't care to tell who supplied it, who is the intermediary between the elevator operators and yourself?

The Witness: Who specifically supplied it.

Exam. Boisseree: Excuse the interruption.

By Mr. Tjossem:

Q. Do you know whether or not those reports include all the elevators in this region?

A. They include all of the elevators on the Milwaukee, [fol. 66] I am quite sure of that.

Q. But you don't know how many of the Great Northern elevators are reported?

A. Well, of course, if we take the amount of wheat that is presumably or reportedly originated by the Milwaukee, then by deduction we can arrive at an approximate figure, and that is what those two figures are.

Q. Well, in other words, what I am getting at is did you make this computation yourself, then?

A. I made the computation so far as my own computation came into it, yes.

Q. What you actually had reported to you was the number of cars that were originated on the average in this territory for the Milwaukee for the period?

A. That is right.

Q. Then you took some figure that you assumed to be the total wheat originated in that area?

A. Well, we know that.

Q. From these reports that you have here in Exhibit 2?

A. That is right.

Q. But you, by deducting the Milwaukee from that you then assumed the balance was Great Northern?

A. After making allowance for the amount of feed and seed consumed on farms—

Q. (Interrupting) Who made that calculation?

[fol. 67] A. I did, based upon U.S.D.A. estimates for Montana for those several years.

Q. All right, now, did you take anything else into your computation?

A. I was after an approximate figure, and that, it seems to me is all that is necessary for the issue here.

Q. Did you consider whether or not there might be some grain under these farm programs that might be stored in Montana and not originated by rail?

A. There is always that possibility, but it would be a very small and negligible figure.

Q. What is your basis for that?

A. Because of our knowledge of the Montana grain trade.

Q. What is your knowledge of the Montana—have you been over there actively in that market, on the ground, knowing what the farmers are doing?

A. Well, every year we make a grain survey trip. I don't presume to know it intimately but I know it practically, and I have been over there for a number of years, and we

talk to these Great Falls people every day of the year, every trading day of the year.

Q. Is there any possibility that some of this grain that is grown over there would go out of there by truck?

A. A little bit has but it is negligible. I would say it is only a fraction of one per cent.

[fol. 68] Q. And what is your basis for that?

A. I can't document it.

Q. You just think that that is the negligible amount?

A. It is reported to us by the people on the ground over there.

Q. So to a very large degree your estimate that there would be 21 per cent of the wheat on the Milwaukee and 79 per cent on the Great Northern is based on what people in Montana told you on the ground?

A. And that's a pretty good figure.

Q. Well, is the answer yes?

A. No, I didn't say that. I said that I constructed this figure on the basis of what had been reported to us plus the factor that I used for the feed and seed used on the farms.

Q. And you didn't take into account, then, the possibility of stored grain or truck grain?

A. Over a six-year period it would be leveled out.

Q. In making your computation, did you add it or subtract anything of this portion you allocated to the Great Northern as possibly not having moved Great Northern or having been stored or being trucked out, did you actually in your computation make such a deduction?

A. There was no possible way for that.

Q. So you disregarded it?

A. I was after a useable figure that you and I could talk about as to the percentage of wheat produced in this north [fol. 69] central and this central area that was moved by the Milwaukee and by the Great Northern, and I think it is a reasonable figure.

Q. Have you any idea of what percentage of the wheat raised in what you describe as the north central and central region would be tributary to what the Great Northern describes, at least for our own purpose, as the triangle, being

the area encompassed by our line from Shelby to Great Falls, as compared to the total wheat in what you describe as the north central and central region?

A. Mr. Tjossem, if I could have got at that answer I would have, but I couldn't do it. I have tried for a number of years to learn, because this question of the issue that we are talking about is so dear and so important to us that if I could have arrived at a better figure through some other method of computation I would have. For example, if we are going to get down to detail, look at Exhibit 2 of the County of Chateau. It is in the southern part of the north central, of the so-called north central, area. It is the largest wheat producing county in Montana. It is served both by the Milwaukee and by the Great Northern, by the Great Northern on the Havre to Great Falls branch and by the Milwaukee from Lewistown to Great Falls, and that wheat in there oftentimes will move from farms in some years to the Great Northern, in other years to the Milwaukee, and vice versa. If the elevators block at Fort Benton, which is a county seat, they may haul down to [fol. 70] Geraldine, a point I don't show here on the Milwaukee, and so it is difficult, if not impossible, for us to arrive at any other method of arriving at the percentage figure. I think it is a reasonable figure.

Q. Now, in Exhibit 3 you show the relation of winter wheat to spring wheat on a six-year average basis, and on your Exhibit 4 you show the percentage of hard red spring and hard red winter to the total of those two wheats. Can you tell me whether or not the total production of wheat is going up or down in Montana?

A. You are asking if I can say whether the total production is going up or down in Montana?

Q. Yes.

A. Well, it has been increasing since the war because the sod has been broken out. I think I have a figure here somewhere, but I don't know where it is now.

Q. Let me understand. Let me ask you about your Exhibit 4. As I understand it, you don't purport to show there whether or not there has been an actual increase or decrease in the total production of wheat, you are merely

showing the relationship of hard red spring to hard red winter, isn't that right?

A. I could have answered that question, Mr. Tjossem, in this way, and perhaps now because of your interest in it I should have. On Exhibit 5, on the graph, on my own copy I wrote in the bushelage figures of the spring and winter, respectively, for each of these years, and then I decided against showing the information in that way, believing that [fol. 71] it might load the graph down with some information that would be rather difficult during the course of the hearing to thoroughly understand.

Now, I can express it this way: for the area in question, the central and the north central area of Montana, there was produced in the year 1950, 26.3 million; in 1951, it was 29.7—

Q. (Interrupting) I am sorry, I didn't get that figure, the first figure.

A. Excuse me. Would you like to put it down on your charts, those of you who would care to do it.

Q. This is the total production of hard red wheats?

A. Yes, of the hard red spring and the hard red winter wheat, respectively.

Exam. Boisseree: But they are not state-wide figures now. He asked you for the state-wide figures originally.

Mr. Tjossem: I am perfectly willing to modify my question to the area here in question.

Mr. Wettrick: May I suggest that all of those present here take the graph that is Exhibit 5 and put these figures down that he is going to give and then we will have them.

Exam. Boisseree: All right, but I want him to state them in the record but the reporter won't mark the official exhibit, unless you want it done that way. But if you do, we will have to stop.

Mr. Tjossem: I think he can just read it off by years and [fol. 72] the amount.

Exam. Boisseree: If anybody wants to mark their exhibit, the official exhibit won't have these figures on it. The official figures will be just in the record. She can't take them down and also mark the exhibit, that is the point of it.

Let's go forward.

A. For the crop 1950 hard red spring was 26.3 million.

Exam. Boisseree: And that is for both?

The Witness: That's for the hard red spring for the 1950 crop.

Mr. Wettrick: What is the unit?

The Witness: Millions of bushels of 26.3.

Exam. Boisseree: And what region, that is about the north central and the central as indicated on your exhibit 2, is that correct?

The Witness: Finely dotted area, shaded.

Exam. Boisseree: Yes.

A. (Continuing) In that same year the production of hard red winter was an even 12 million. Now, these are rounded to the nearest tenth of one million.

In 1951, hard red spring production was 29.7 million; hard red winter was 18.9 million.

Mr. Wettrick: Now, those figures go into the first bend on these lines that you show?

The Witness: That is right.

[fol. 73] Mr. Wettrick: On Exhibit 5?

The Witness: Right.

A. (Continuing) In 1952 hard red spring was 25.2 million; hard red winter was 17.8 million. In 1953 hard red spring was 31.9; hard red winter, 19.5. And I might add that that was the year when Montana harvested six million acres of wheat, just slightly over six million acres of wheat.

The 1954 crop, the spring production had declined to 18.5 million; the hard red winter had increased to 24.7.

For the 1955 crop of spring had declined still further to 13.4 million, and the winter had increased to 42.0 million.

Mr. Wettrick: What was the question Mr. Tjossem asked?

Exam. Boisseree: He wanted total production figures, he got it. That was an answer to his question.

Mr. Wettrick: Though it would be necessary to add together the pairs of figures which the witness gave in each case.

Mr. Tjossem: Well, anyhow, it is there.

By Mr. Tjossem:

Q. Now, I think you testified that this shift from spring wheat to winter wheat is, I think you said, accountable because of some improved varieties of winter wheat and also better growing conditions, is that your testimony?

A. And one other point being that the hard red winter wheat yield exceeded the hard red spring varieties by 3.7 bushels per acre or roughly 20 or 21 per cent. I have forgotten the percentage figure.

[fol. 74] Q. Isn't there some correlation between this shift and the subsidy program, if I can use that word, of the federal government to the wheat farmer?

A. There might be a small factor, Mr. Tjossem, but, as I mentioned, that the incentive or the inducement to plant the hard red winter varieties was only partially overcome by the extra prices paid for hard red spring wheat as compared to hard red winter wheat, and nearly all of this period—I say nearly all because I am not quite sure that it was exactly—that the market price for wheat was above the minimum port level and so I don't think that was a factor. It may have been to some farmers, of course, for some reasons at different times, but I would say it was a natural trend.

Q. The support price on wheat is the same whether it is the hard winter or hard spring wheat, isn't it?

A. Basically, except when the protein rises up above 14 protein.

Q. If you had above, couldn't you get the same equivalent prices?

A. The spring would bring about two cents or maybe three cents more at the 14 level—no, excuse me—two cents more this year and then as the protein goes above 14, then there is additional premiums for protein for spring as compared with winter.

Q. All right, now, what has been the experience commercially on that same wheat, are you paying a premium on your high protein winter wheats as well as your high protein spring wheat?

A. Now, are you speaking about the current market or [fol. 75] the market during this period?

Q. I am talking about the crop year 1955-56, yes, current year.

A. That was a depressed protein year, particularly in the case of winter and in the case of spring. I made that point, I believe. Because of that July period which together with other climatical conditions just seemed to wash the quality out of all of the wheat produced in that historical area of origin for us.

Q. In other words, you haven't been able to buy any protein wheat in this area in Montana during this—

A. (Interrupting) Pardon me?

Q. You have not been able to buy any high protein wheat in this central and north central area during the present crop year?

A. In the present crop year, yes, but in the crop year ending June 30 it was necessary for us to go along with other west coast mills into the northern part of the state, as I referred to earlier, and to buy their high protein. As a matter of fact, it was the only source of high protein wheat in that particular year.

Q. How far east did you go for that grain?

A. We went as far east as Sidney.

Q. That is in Montana?

A. That is the Dakota border in Montana.

Q. What kind of rate did you pay on that to get it to Portland?

A. We paid for Sidney, including the increases ninety-[fol. 76] six and a half cents per hundredweight to get it to Portland versus fift-eight cents to Minneapolis.

Q. Was there a through rate on that to California from Sidney?

A. There was a joint rate of $1.29. We haven't even touched upon that immeasurable cost in our case, and that was one of those immeasurable costs.

Q. Well, the fact is, a mill that was located on the Great Northern route to California would have had to have paid the same rate, wouldn't he?

A. But there was a difference, and I don't know whether you want to get into transit balances or not. Have I answered your question, though? You asked what the rate was to California, and I have answered $1.29.

Exam. Boisseree: He has asked a further question now, Mr. Mikkelsen, and that is whether that $1.29 rate would be applicable to Seattle mills or any other mill besides yourself from the same point of origin.

A. It would be applicable to those mills who had joint rates, Mr. Examiner.

By Mr. Tjossem:

Q. Isn't it a fact that the Spokane and Seattle mills would have the same joint rate?

A. The Spokane mills, the Seattle and Tacoma mills would have had the same rate, but we didn't have a rate to California. We had to pay ninety-six and a half cents to get it into Portland, and we were dead with it.

[fol. 77] Q. In other words, you didn't have a through rate to California from that point? I thought you testified you did have.

A. Not on the Great Northern we didn't.

Q. Did you have a through rate from Sidney to California?

A. Sidney is located on both the Great Northern and the Milwaukee. We bought wheat on both lines.

Q. So you did have, when it moved to Milwaukee, you did have that rate, didn't you?

A. We didn't buy our wheat out there any longer than we had to at that origin.

Q. You picked the point. But the fact is you did have the same rate on wheat that originated at Sidney, Montana, to California as your other competitors in the Pacific Northwest, isn't that the fact?

A. On the Milwaukee we did.

Q. But there is a rate on the Milwaukee, isn't there?

A. Yes, that is right.

Q. Then the answer to my question is yes, you did have a rate, the same rate?

A. I want to qualify it by saying, on the Milwaukee.

Q. But you didn't have it on the Great Northern?

A. That is right.

Q. Sidney is on the Northern Pacific rather than the Milwaukee?

A. You may be right, Mr. Tjossem.

Q. But either way you would have had the rate?

[fol. 78] A. You may be right. Shall I take the time to check?

Exam. Boisseree: I don't think so. The main point is that you have those joint rates from origins on the N.P. as well as the Milwaukee, don't you? And you so testified?

The Witness: Yes, sir.

Exam. Boisseree: I think that was the only point. However, if Mr. Tjossem will permit the interruption, either I made a wrong note or you misspoke yourself. You said a ninety-eight and a half cent rate from Sidney to Portland and you then later said a ninety-six and a half cent. I don't know that it is important, but if you want to keep the record straight you might straighten it out.

The Witness: 96.5 to Portland and Seattle from Sidney is correct.

Exam. Boisseree: Off the record.

(Discussion off the record.)

Exam. Boisseree: On the record.

By Mr. Tjossem:

Q. As I understand it, the current crop year you can buy high protein in these north central and central regions of Montana, is that right?

A. That is correct.

Q. And what is the basis of the sale of those wheats, I mean, how do you buy that, do you buy that on the Portland market, do you buy it Exchange Portland?

A. Montana prices are based on Minneapolis prices less [fol. 79] the difference between the rates east and west. However, our west coast prices for Montana wheat have been higher, independently higher, than the Minneapolis equivalent, because of the reluctance of farmers to sell, and the very keen competition on the part of the mills to get the kind of wheats they wanted.

Q. In other words, then, when you say the west coast market, you are talking about the Portland Grain Exchange market?

A. The Portland Grain Exchange does not quote prices for Montana wheat.

Q. Who quotes those prices for wheat?

A. As I said a moment ago, our Montana prices are the Minneapolis prices, and in the triangle and the so-called basin area is about three cents less, normally, if we are strictly on a Minneapolis basis. Because of these special circumstances that I have said, the reluctance of the farmers to sell, the mill competition among themselves, has created prices for wheat at Great Falls, you see, which are independently higher than the Minneapolis equivalent.

Q. Well, do you buy this wheat through a broker or do you buy direct from the elevator man?

A. Both. Mostly through elevator operators.

Q. And they quote you—how do they quote their prices, you say based on Minneapolis less the freight to get it to Minneapolis, the normal circumstance?

A. That is right, and less about three cents to reflect the [fol. 80] difference between the rating east and the rating west from the triangle and the Judith Basin, in other words, in this north central and central area.

Q. Your rate westbound is about three cents less than the rating into Minneapolis?

A. That is right, three and an eighth, about three and an eighth cents. We call it three. Then that establishes our daily price for Montana spring.

Q. Isn't that in effect, then, that they are quoting you the Minneapolis price less the freight that you have to pay to get into the west coast?

A. That is right.

Q. So that you are in effect paying for this wheat delivered at Seattle, Portland on the Montana coast rate. You are paying the Minneapolis price less that coast rate to the North Pacific coast ports, is that right?

A. That is right.

Q. Is that wheat being sold on a basis of, say 12 per cent protein? How is that quoted to you?

A. Depending upon the wheat being offered, it bases 12 or better or 13 or better and so on, plus premiums, both those different bases.

Q. All right, that is what you wanted to get it at, a given typical day during this last crop year. If you had a quotation on a 12 per cent protein, what would you have to [fol. 81] expect to pay as a premium for 13?

A. Currently or this last crop year?

Exam. Boisseree: I think you are mixed up on your crop year. You are considering the year as the one that the witness considers as ending. He considered June of 1956 as last year, and I think you have indicated as this year's crop.

By Mr. Tjossem:

Q. I understand that crop year ending June 1956 was a full year. I am talking now about the current crop year, the wheat that is now available to you out of Montana, what you are currently paying for 13 or 12 protein.

A. We haven't been dealing with 12 at all, Mr. Tjossem, we are paying, we are bidding and buying our wheat on the basis of 13 or higher protein or 14 or higher protein and so on.

Q. All right. What are you paying, do you know what you are paying for 13 in comparison to what they would quote you 12? If you don't know just say you don't know.

A. I am trying to think. I am going to say I don't know.

Q. What would they quote you on 14 as compared to 13?

A. Well, now I have some help.

Exam. Boisseree: You want the answer don't you, Mr. Tjossem?

Mr. Wettrick: This is your daily market.

The Witness: It is an option and cash wheat market for October 1.

Exam. Boisseree: Tell what you are refreshing your memory with there.

[fol. 82] The Witness: On October 1, nominally there was a premium of six cents a bushel for 14 or 13 protein. Now, of the particular scale used on that day, I don't know, I am guessing that it would have been one and a half cents each one quarter which would make six cents.

By Mr. Tjossem:

Q. Is that premium applicable to both the spring and winter wheat? Are you talking about spring?

A. That is the premium applicable to spring.

Q. Do you know what the premium was on the winter wheat equivalents?

A. Two cents.

Q. Two cents for 14 or 13?

A. Two cents for 14 or 13.

Q. That would be on probably half a cent a quarter, possibly?

A. It would be one each half, I think, Mr. Tjossem.

Q. Is there greater premium made on 15 or 14?

A. Well, particularly this is one of these years where we apparently are going to encounter rather substantial premium for protein and since harvest the protein scale has been rising almost weekly. On October 1, 15 protein was at a thirteen cents a bushel premium over 14; 16 was at a sixteen cent premium over fifteen per cent protein.

Q. Incidentally, what protein do you mill into your flour that you are sending to California?

A. We manufacture many grades. I think, Mr. Tjos- [fol. 83] sem, that Mr. Welk would be better able to describe that to you than I am.

Q. Now, you said that there is about 21 per cent of this production in this north central and central region available to the Milwaukee. Can you tell me about how many bushels that represents?

A. I can give you my figures for these six years.

Q. Can you just strike a fair average?

A. Well, it ranged from 7,500,000 bushels in 1952 up to 11,685,000 bushels in 1954. Now, those are the official, I don't mean official, those are the trade estimates.

Q. That included both the hard spring and hard winter?

A. That is right.

Q. And do you know the breakdown between those two varieties?

A. No, sir, only as I can estimate it.

Q. At least, on your statistics in your Exhibits 2 to 3?

A. That is right.

Q. I think you said in 1955 and '56 you found that you

only got 9 per cent of your grain off the Milwaukee, is that your testimony?

A. We only got 9 per cent of our hard red spring off the Milwaukee.

Q. Did the fact that you had to go east for that have any bearing on that rate on—

A. (Interrupting) No, no, because we picked up all of the quality hard red spring produced on the Milwaukee be-
[fol. 84] cause we had a place for it. Fact is, we had to have it if the quality was right. Of course our quality comes first, our transit comes second.

Q. This year that you were testifying about is the year in which you had the very poor quality in the north central and central regions of Montana, isn't it?

A. That is right.

Q. Did you make any study to determine what percentage you got off the Milwaukee in the crop year ending June 30, 1955?

A. You mean the percentage?

Q. Yes. You testified, as I recall, that during this very poor year of 1955, '56, when you couldn't get quality wheat out of the north central and central region that that year you only got 9 per cent of your hard spring wheat off the Milwaukee. Now I want to know what did you do in a normal year, what percentage did you get off the Milwaukee, say, the year ending 1955?

A. I think I mentioned ~~that it~~ ranged from 35 to 52 per cent and for that year I may or may not have it here, I don't know.

Q. Your best recollection is that normally you will get from 35 to 52 per cent of your hard spring wheat requirement off the Milwaukee?

A. Yes, sir.

Q. Well, now, where did you get this other 91 per cent of the hard spring wheat in 1955, '56? Is that off the Great Northern?

[fol. 85] A. We had a very small amount, almost a negligible amount, that came off of the Northern Pacific.

Q. There isn't any on the Union Pacific at all?

A. It isn't available to us.

Q. You mean by that, if there is any it goes down through Ogden and out through your route?

A. Yes, sir.

Q. Well, now will you look at your Exhibit No. 6? As I recall, you testified that the quality of wheat that you wanted was principally down along the north line of the Great Northern from Havre to Shelby, as I understand. Is that substantially what you said; that is where the real quality wheat was grown?

A. That is where most of the highest protein is grown and in these recent years that has become the major pocket of the hard red spring.

Q. I notice in your Exhibit 6, for example, that Chouteau County shows the spring running at 14.9 as compared to 15.1 in Hill County, there is not much difference there, is there?

A. No, sir.

Q. And the wheat grown in Chouteau County is tributary to the Milwaukee, isn't it?

A. That is correct.

Q. Then down to the Judith Basin—

A. (Interrupting) These are rather simple averages here, don't give adequate for bushelage?

[fol. 86] Q. (Continuing) Well, I notice, for example, in the Judith Basin country there again you've got a spring of 14.8, that is served by the Milwaukee, isn't it?

A. Practically none of it. There are one or two stations that may draw off of that, such as Coffee Creek, and perhaps Denton, but most of Judith Basin County is served by the Great Northern, as far as bushels are concerned.

Q. Well, now, will you look at your Exhibit No. 7. You mentioned that the protein averages shown on Exhibit No. 6 were just simple averages. Can we assume that that is also true of the protein percentage you show in the bottom part (b) of Exhibit No. 7, that represents simply simple averages of the total wheat produced in Washington, or Oregon, and north Idaho?

A. It is hardly that, Mr. Tjossem, but I think it is a descriptive figure, it is not weighed, the protein content as shown here, for example, in 1955 as 10.5 is simply the average of the random samples that were proteined by the cereal

chemists who are members of the Pacific Northwest section of the Association of cereal Chemists.

Q. There are regions in Washington and Oregon that do raise higher protein wheat than 10.5?

A. That is right. There were some pockets of it in Franklin and Adams Counties, and Benton County, but I didn't make note of the estimate of bushels that I thought might have been 12 or better. I thought perhaps somewhere in [fol. 87] here I had reference to that. I would guess—

Q. (Interrupting) I don't want you to guess, so if you have to guess, just leave it out of the record. Isn't that wheat in Franklin and Benton County available to you?

A. Franklin and Adams County is available to us.

Q. Benton is not?

A. It is not high protein, there is low protein, there is stuff we won't have nor would anybody else have.

Q. You did testify there was some high protein winter wheat in those counties that would be available to you?

A. Yes, but there wasn't enough to go around to all of the mills by any means.

Q. No, but it is still a source of this wheat to you?

A. Small source.

Q. Let's look at your Exhibit No. 8. As shown by your Exhibit No. 15, that you had what I would call a relatively high percentage of your production going into California, now of that production that is going into California, I will ask you if you ever to your knowledge paid that combination rate of a dollar forty-nine or a dollar seventy-seven that you show on Exhibit No. 6 as applying from Chester, Montana, to San Francisco and Los Angeles, respectively?

A. Not to my knowledge, although the situation has reached the point where we are faced with that problem.

Q. But you have never paid that rate, to your knowledge? [fol. 88] A. Not to my knowledge in California.

Q. That is what I am talking about. The rates you show are a dollar forty-nine or a dollar seventy-seven?

A. That is right.

Q. Or have you ever paid the combination rate on that move before the ex parte 196 increase or ex parte 175 increase?

A. Not to my knowledge.

Q. Have you ever paid the combination rate to San Francisco or California after the cancellation of what you describe as a port-to-port rate in Docket 2972?

A. I don't know.

Q. Do you know of any instance where you did pay?

A. I don't know. Time did not permit us to go into it.

Q. Do you recall any, you weren't aware of any instance?

A. I don't know.

Q. You mean you don't know of any instance?

A. Well, I don't know whether we did or we didn't.

Q. I take it that is the equivalent of saying you can't recall any instance that you did, that you can't recall any instance, you weren't able to recall one without searching the record, is that right?

Exam. Boisseree: That is the way the question was directed to you, was whether or not you could recall of an instance where you had paid.

The Witness: I do not recall.

[fol. 89] By Mr. Tjossem:

Q. As I gathered from your testimony; it was substantially all these flours that are going into California are made out of either the hard winter or hard spring wheat, is that your testimony?

A. I don't recall what I did say on it. If I am to answer on that I want the record. I would say this much, Mr. Tjossem, that just all but a very minor part of our stuff going into California is made from hard wheats, but I don't recall what I said.

Q. I am not trying to trap you. I gathered the inference that was the substance of what you were saying. I will ask you, then, do you know what percentage of your flours going into California are milled out of hard winter or hard spring wheat, out of the red wheats?

The Witness: Mr. Examiner, may I ask a question of Mr. Wettrick?

Exam. Boisseree: Yes, you go ahead and ask a question. We will see what happens from there.

The Witness: Mr. Wettrick, I don't have information available here to show the breakdown of grades of flour

that we shipped into California. I am asked a question by Mr. Tjossem whether or not it is all made from hard wheat.

Mr. Tjossem: The hard red wheat is what I am talking about.

Exam. Boisseree: Maybe I can help out here a little bit. I think what he means, he is trying to get a breakdown. I [fol. 90] think your testimony was the flour for commercial bakeries, for bread flour, and a lot of that is a blend, and I think he was wondering whether you used any of these soft wheats in blending these flours that you send out there.

The Witness: Would it be fair, Mr. Tjossem, to ask if you would direct that question to Mr. Welk when he testifies?

By Mr. Tjossem:

Q. You don't know, in other words?

A. Mr. Welk could give you a better answer than I. I would say this, that it is all bread flour or practically all bread flour.

Exam. Boisseree: Most of your bread flour or the greater proportion of your bread flour is ground from these hard wheats?

Mr. Tjossem: Are we going to let Mr. Welk answer the question, is that the idea?

Exam. Boisseree: I think we better go on until we get to this if you want specific information, and apparently you do. He doesn't want to give it.

Mr. Tjossem: I was perfectly willing to let him answer until you asked the last question, Mr. Examiner, and he again testified, as I understand it now, that he knows that substantially all of these flours going into California is made out of these hard red wheats.

Exam. Boisseree: Maybe I misled him there on it. You will have to go ahead and answer that last question.

Mr. Tjossem: I didn't wish to press him, but if he would withdraw that statement and say Mr. Welk is going to [fol. 91] testify on the subject, I will accept that.

The Witness: Would you do that?

Mr. Tjossem: All right.

By Mr. Tjossem:

Q. Would you look at your Exhibit No. 12? As I understand, where you show flour consumption, production capacity, and deficit, that that is expressed in hundreds of pounds, is that what you intended by that?

A. Yes, sir.

Q. You don't mean to infer by this Exhibit No. 12 that California is short of flour, do you?

A. I only want to show here that their milling capacity is deficient by about this figure.

Q. In other words, you don't intend to infer that California is having any difficulty getting all the flour they want?

A. Not to my knowledge. Let's see, how does it read? Estimates showing from the states indicated, the population, estimated flour production and capacity and surplus or deficit of capacity relative to the estimated flour consumption.

Q. I think you can see there is plenty of competition in California?

A. Yes, sir, there sure is.

Q. Well, now, I didn't follow you at all whether you were testifying that by use of Exhibit No. 12 and Exhibit No. 13 you could come to the conclusion that there was from 8.3 to 9.5 million pounds of flour exported annually into California?

[fol. 92] A. Imported annually into California.

Q. Will you tell me how you can draw that conclusion from those two exhibits?

A. Well, by taking the calendar year 1954, on Exhibit 13, which indicates roughly 8.3 million hundredweight was the difference between the terminated carloads of flour in California and the originated carloads of flour in California, would give us the lowest figure, and turning back to Exhibit 12, we show here a theoretical figure, I will admit, of around nine and a half million bushels, somewhere between those two figures is about what California has to import annually.

Q. Well, I think you mentioned that the deficit that you indicate for California is only a deficit provided California's

per capita consumption for flour is the same as the national average.

A. That is right.

Q. You have no idea as to whether it is or isn't?

A. I do not.

Q. Looking at Exhibit 13, wouldn't the tons originated in California also be included in the rail reports of the tons terminated in California?

A. They would, so the difference then would be the out of state.

Q. Yes, and this Exhibit 13 also must assume that all of the flour that is milled in California is originated and terminated by rail, then, doesn't it?

[fol. 93] A. That is right, which is an assumption.

Q. And is it very likely that those California mills bring in a lot of wheat and mill it and that wheat never sees rail again and goes into consumption in California?

A. That is true, but we could go on to say that some of the intermountain flour may be trucked in there from Ogden and Salt Lake by an individual.

Q. But do you know?

A. We don't know any more than we know what the California mills trucked in there.

Q. Isn't there a flour mill incapacity in the bay area in California?

A. There is a mill at Vallejo.

Q. Do you think that the mill at Vallejo would rail ship much of its flour it is delivering in the bay area?

A. I think we are talking about something now that we can only suppose. The bakery people are not here to say from whom we buy, they buy their flour, for all we know, Sacramento, Bakery, one of the largest system bakeries may rail it all in there even though it is just a few miles away.

Q. Isn't there milling capacity in the Los Angeles area?

A. Yes, sir.

Q. Do you think that that will deliver by rail in the Los Angeles area?

A. I wouldn't think so, and yes, though, Fisher Flouring [fol. 94] Mill and Continental Mill are railing flour down there. If I may say so, we are talking about something we

can only roughly estimate. That is all I was trying to do here.

Q. What you did in making your figures on Exhibit 13 was to simply take the rail reports to the California Public Utilities Commission for the year shown of terminated and originated flour in that state?

A. Yes, sir.

Q. And the conclusions that you stated as to the minimum amount of flour imported, to be drawn from that, is your own conclusion?

A. I think I said this: this exhibit and No. 12 indicate that California currently imports about 8.3 up to 9.5.

Q. Now let's look at your Exhibit 15. I understand in making this exhibit you took your total flour sales for the crop year and then determined what percentage of those sales were in California, is that your method?

A. Yes, sir.

Q. Do you know in what area in California you made those sales?

A. We do, but they are not shown here.

Q. Can you just generally describe the scope of your distribution down there as represented by these sales here?

A. Pardon me?

Q. Can you just give us a sketch, outline, of the territory that you encompassed in this distribution that you show [fol. 95] by the sales in Exhibit 15?

A. It would be mostly in the bay area, I would say, from a line roughly east and west through Sacramento south, and then up in the Eureka, California, area on the coast.

Q. In the crop year 1955 and '56, can you tell us what part of that 65.8 per cent of your total sales which were made in California represent sales north of Fresno?

A. We don't have it broken down in that way.

Q. You haven't any idea of the relationship?

A. I don't know.

Q. Are those sales substantially sales to bakeries?

A. Commercial bakeries.

Q. It doesn't include any of the family flours?

A. No, sir.

Q. Or small package flour?

A. No, sir.

Q. These are in hundredweight bags?

A. Nearly all of them.

Q. Do you also include in that your whole wheats?

A. Yes, sir.

Q. Is that whole wheat made out of these same wheats?

A. It is made out of a high protein Montana spring.

Q. You were indicating that you anticipate some difficulty in the sales in California. It is a fact that your sales in California in the crop year 1955 and '56 were in-
[fol. 96] creased over your 1954, '55, aren't they?

A. That is right.

Q. Do you know the reason for that?

A. It is larger, but it is within about ten per cent of the preceding four-year average. It could be accounted for in several ways. It is a combination of reasons.

Q. You say it is a combination of reasons?

A. It could be a combination of reasons.

Q. You can't tell us what the reason is?

A. We had some quality flour that was competitively priced.

Q. Can you tell us what experience you have had with the crop year 1956, '57 so far as to retaining your California sales?

A. I would like to have Mr. Welk answer that.

Q. You don't show any of the sales you had for the year prior to 1951, '52. Do you know generally whether your 1951, '52 is more or less than the preceding five-year average of your California sales?

A. It is a little difficult to answer that because we lost our Pendleton mill, the largest mill of the system, in July of 1947, which made a good deal of difference.

Q. We are talking still about ratio on California to total. I don't know if that would make much difference.

A. I think it would because the Pendleton mill was largely devoted to the production of hard wheat flour for California.

Q. What I am going to get at is this, looking at Exhibit
[fol. 97] No. 16, you show as I understand the exhibit, that for the period of March 28, 1938 through to April

27, 1940 you had an advantage by your rail-water route over the all rail route to California. Do you know what percentage of your total sales during those years were California sales?

A. I do not.

Q. Do you have any idea as to what your percentage of your California was to the total sales for the next period you have there, from April 27, 1940 to December 1, 1941?

A. I do not.

Q. Do you know whether or not your California business as represented by the average on Exhibit No. 15 is an increase over your former year's average business or does it represent a decrease in business?

A. Since I don't have the figures here I can't answer that.

Q. Do you think Mr. Welk could answer that?

A. I don't know.

Q. Well, at least, then, so far as you know, you are not aware of having lost any substantial amount of your California business as a result of this change in rates that you have set forth on Exhibit 16. If you have lost it, at least you are not aware of it, is that your testimony?

A. The point that we wanted to bring out—

Q. (Interrupting) No, I want you to answer my question. Are you aware of whether or not by reason of these [fol. 98] rate changes you show on Exhibit 16 you suffered a decline in your California business?

A. (No response.)

Q. If you don't know just say so. I want to know whether you know or not.

A. We haven't yet lost any business, we are on the verge of it.

Q. You are afraid of it, that is your testimony? So these rate changes shown on Exhibit 16, so far as you know, did not cause you to lose any business in California?

A. The only period that we are giving figures here for are for the five last years.

Q. I am asking you what you know. You have been with this company twenty-five years and I want to know, are you aware of any decline in your California business by

reason of the rate changes you set forth on your Exhibit No. 16?

A. Well, I can say this, that I can't answer that directly, but we have gotten to the point because of the lack of a joint rate on the Great Northern, we are at the place where we have to determine from time to time if we have adequate billing to get into southern California.

Mr. Tjossem: I move the answer be stricken as not responsive and, Mr. Examiner, I think the witness should be directed to answer the question. He either knows or he doesn't know.

Exam. Boisseree: The answer was non-responsive to the question and thereby considered stricken, and I would [fol. 99] ask the reporter to read the question of Mr. Tjossem back to you, Mr. Mikkelsen. I don't think you replied to it at all.

(Question read.)

A. I don't know.

By Mr. Tjossem:

Q. You don't know of any decline?

A. I am not prepared to answer. I do not know.

Q. Are you familiar with the reason why these port-to-port rates were cancelled?

A. Because, I think, they were in violation of the fourth section.

Q. And they were ordered cancelled by the Commission, were they not?

A. Yes, sir.

Q. They were actually fourth section rates, isn't that what they were? Is that right?

A. That is my understanding.

Q. Well now, would you look at your Exhibit No. 18? I think you described the Great Northern transit as the almost unuseable transit, is that the way you described it?

A. It is unuseable to the extent that we can't get beyond Portland without paying joint rates, combination rates, excuse me.

Q. The fact is, you did use the transit as shown by your Exhibit No. 18, didn't you?

A. By paying the combination.

Q. Wait a minute. Did you pay the combination on all [fol. 100] of this application shown on Exhibit 18?

A. Only on a part of this on line 1.

Q. That is flour and mill feed?

A. Yes.

Q. And that was moving to what, southern Oregon destination?

A. The Willamette Valley point.

Q. As I understand, the part of the tonnage you show on Exhibit 18 moved under transit application in which you had to pay something in excess of the coast rate on that move, is that your testimony?

A. We had to pay something in excess of the joint rates, yes. In other words, the combination to, say, Medford came with higher than the through rate to Medford.

Q. And I think you testified that where you did that that those moves took place under what you describe as the same arrangement as though they were moving under joint rates to destination except that you paid the combination rate, is that right?

A. I don't recall the wording but I would say so, yes.

Q. You say it moved on a through bill of lading?

A. Yes, sir.

Q. That bill of lading was through from where to where?

A. For example, from Waitsburg to Medford, Oregon.

Q. That would, then, be a joint move from a point on the Union Pacific to a point on the Southern Pacific?

A. That is right.

[fol. 101] Q. The bill of lading did not include the Great Northern?

A. It included a Great Northern transit from Chester to Waitsburg and then to Portland.

Q. The bill of lading, it was issued by you, say, at Waitsburg, as a representative example, is that right? It would be a Union Pacific bill of lading, would it not, and it would show whether it was feed, so many sacks of mill feed, routed from you to, say, a buyer at Medford, Oregon, route Union Pacific Oregon, S.P., is that right?

A. I am not even so sure that we would show the routing on it. Mr. Tjossem.

Q. But at least it would move U.P., S.P.?

A. That is right.

Q. And on these shipments you are talking about going to Southern Oregon through Portland are moving via your line, from your mill via Union Pacific to Southern Pacific to Portland; the Great Northern is not involved in that transportation, that is, that particular segment of the transportation?

A. The Great Northern is involved in the transportation from Waitsburg to Portland.

Q. From Waitsburg to Portland?

A. Somehow they are.

Q. How is that?

A. Because the Union Pacific have the through route from Chester to Portland, it is the same as it is from [fol. 102] Chester to Waitsburg. I don't know about the division of the rates, I might as well—

Q. (Interrupting) The fact is that as far as the transportation of these products through Portland to the southern Oregon points, from your mill on to those southern Oregon points the transportation service is rendered by the Union Pacific and the Southern Pacific, isn't that right?

A. That is right.

Q. And the Great Northern doesn't render any part of that service?

A. That is right.

Q. Now then, where you apply Great Northern, this transit on that, then you do show a reference to a Great Northern freight bill?

A. That is right.

Q. As having, for example, a part of that or all of that tonnage having originated at Chester, Montana to Waitsburg for milling and transit and on that you will then show that that quantity you are shipping out can move to Portland with no additional charge, is that right?

A. That is right.

Q. And you show because of the rate beyond Portland you had to pay some additional over that?

A. We have to pay the local rate from Portland to Medford.

Q. Is that right? By reason of the Portland-Medford move beyond Portland?

[fol. 103] A. Yes.

Q. Is that right?

A. That is right.

Exam. Boisseree: Are you going to be much longer, Mr. Tjossem?

Mr. Tjossem: I think we will be another 15 or 20 minutes.

Exam. Boisseree: We will take a short recess.

(Short recess.)

Exam. Boisseree: On the record.

Go ahead, Mr. Tjossem.

By Mr. Tjossem:

Q. Well now, I would like to get into what could be described as a long, sad story of this problem of having to watch and police your transit, as I gather is what you are doing today when you buy grain off of the Great Northern with no right to transit beyond Portland and that grain comes into your mill at Waitsburg or your other mill, that you then have other freight bills there on grain that you purchased elsewhere and you have moved that flour, milled, out of the Great Northern on to California and that is what you do today, right?

A. Yes, that is what we have done.

Q. Where do you sell this other roughly 35 per cent of your capacity?

A. We don't have any figures with us showing the sales destination breakdown of it. I could generally list it if that would be sufficient.

[fol. 104] Q. Yes, I would like to have you do that.

A. It would be the Pacific Northwest states of Oregon, Washington, and the North Atlantic states, the North Central states.

Q. How do you reach those North Atlantic states and North Central states?

A. For what we are putting back there we use the most reliable or the best transit that is available, that would be the transit taking along the way the point of origin to Portland, because the through rate from Portland to New York is the same as it is from Portland to New York.

Q. That is an all rail move, is it?

A. Yes, sir.

Q. You are not using water on that?

A. No, sir. And then export for a certain segment of it, also sales to the U.S. Government Quartermaster Corps.

Q. Where do they take delivery?

A. We specify Portland delivery on that, exclusively, for the purpose of dumping this goods.

Q. That is what I was getting at, this other 35 per cent of your business in 1955 and '56 could use and did use Great Northern delivery on that basis?

A. We did, but under conditions that we didn't like at all, either as to price level at which the flour was sold or for several other reasons.

Q. You are using that to get flour to the Portland market?

[fol. 105] A. Yes, sir.

Q. And to the Seattle market?

A. No.

Q. You just go into Portland?

A. And Vancouver, only in a very small degree, also on which we pay the local.

Q. Do you buy any grain that is delivered to your mill by truck?

A. We have truck-in wheat.

Q. Is that just from local regions around your mill or is it for some distance away?

A. Almost entirely, all but a negligible amount is trucked in by the farmers who have been hauling there for several generations.

Q. That is quite a wheat growing region that you are located in?

A. But our ability is very inhibited because we need the space for our milling of wheat.

Q. How much storage capacity do you have at your mills?

A. The combined capacity is about 740,000 bushels. Waitsburg has about 30 per cent of it and the other two mills have about 35 per cent each, of it.

Q. What part of your average annual consumption of grain is represented by that 740,000 bushel storage? Can you give me a rough approximation?

A. Well, actually we only receive from farmers trucked in, presently, about a hundred fifty thousand bushels, is [fol. 106] all that we take.

Q. What would you say you would grind on a normal crop year?

A. We would grind more than that, of the local types that are trucked in to us.

Q. And where do you get those, the local wheat?

A. Largely through the truck-in from the farmers, if it is of the quality that we want to use and it just happens that the quality of the wheat grown by the farmers, locally, who haul in to us, produce those varieties of such quality that we can and do desire it. It is very high quality.

Q. You don't buy any grain for resale as grain?

A. We merchandise a little bit.

Q. Say, grain that was trucked in locally, couldn't you move that to Portland on this Great Northern transit?

A. We do.

Q. Don't you do that?

A. Some of it probably does, during the course of the year, go down there by that means, backed up by Great Northern transit, but it is not received there for storage, for that purpose, because we receive it only if we feel that we can use it in our milling production.

Q. You don't go out and actually try to merchandise grain as such, then?

A. No, sir.

Q. Now, I didn't quite understand this operation you had [fol. 107] at Spokane. You say you leased an elevator space there?

A. We leased some space on an annual basis and the Montana wheat, particularly of those kinds and qualities

and protein levels that we were lacking in space for, perhaps even on the critical list as far as availability is concerned, we let that stuff flow into the Spokane elevator. Its identity was preserved, the transit was registered by the elevator company in their own name, they paid the freight from Chester to Spokane, and later on when we asked for delivery of the wheat they were able to substitute other billing for it, practically all of which was from the N.P. or the Union Pacific, from the produce area of eastern Washington.

Q. Under which transit you could get into the California market?

A. That is right.

Q. You say that that operation cost you ten thousand dollars?

A. We estimate that the cost was about ten thousand dollars, I believe our exact figure was nine thousand eight hundred and some odd dollars.

Q. What items went in to make up that cost?

A. We did not charge any monthly storage or insurance to it, it only represented the in charge, the out charge, the inspection fees and the grouping of the boxcars.

Q. That was a handling charge by the elevator?

A. Yes, and not storage charges.

Q. You didn't pay the elevator anything by reason of [fol. 108] the fact that they gave you this substituted transit outbound billing?

A. No, sir.

Q. That is something they were able to do for you without charge?

A. We just traded dollars on that.

Q. They could use the Great Northern transit to move some other wheat out of their elevator, since they could, they then gave you some other inbound billing when they moved your wheat out and they charged you nothing for that exchange of transit?

A. No, sir, excepting as to the inbound and outbound that they used, that was just a bookkeeping operation.

Q. I understand. Actually it didn't cost you anything and it didn't cost them anything. Well, the fact is, too, that you, by using that elevator space in Spokane, you had

available to you storage space that would not otherwise be available to you?

A. We would have used the space up there to some extent. We use auxiliary space in Montana, we use auxiliary space in Spokane as the situation warrants us or requires us to do.

Q. Is that because you find that this select wheat is being offered and it is advisable to get in and buy it up so you have it when you want it?

A. That is true, and also what we call shorts or protein levels in a critical supplies amount.

Q. For example, if I understand what you are saying, a given crop year the 15 per cent hard spring wheat is short of supply, if you see a chance to buy it, you buy it, you buy [fol. 109] it whether you need it at that moment or not, is that what you mean?

A. Well, tend to accumulate it.

Q. So you have rented this storage so you will have a place to put it so you can buy it in advance of need?

A. That is right, we use Spokane, we use Great Falls, we use Lewistown.

Q. Then, I think you mentioned this happened one year, this use of elevator space in Montana and Spokane is continuing general practice?

A. Only in the last two years because of this critical development of our transit position.

Q. There again, hasn't the government policy on their support to farmers had some bearing on the availability of that wheat throughout the milling year?

A. No. As to what wheat?

Q. This premium wheat that you talk about?

A. No, because all during this six-year period that we have been referring to, on the level of price has been substantially above the loan price and at times extremely above the loan price.

Q. Do you know whether or not it is the practice of your company's competing mills to follow on this same practice you have been following the last two years of going out on the market and buying this and storing it in other places, other than their mills?

A. I don't know.

Q. You don't know what their practice is?

[fol. 110] A. I don't know. They may at times.

Q. Now, you say you are spending far too much time in planning out your transit moves. Is that substantially what you are talking about, it takes a lot of time?

A. Yes, sir.

Q. Do you do that for the company?

A. Primarily, yes, sir.

Q. How much of your time each day would you say you spend at that?

A. I can't estimate it, Mr. Tjossem.

Q. Is it half a day, a quarter of a day?

A. I would say it is at least a third of a day.

Q. About a third of a day. And how many cars of wheat inbound or outbound would that represent on the average?

A. It would have to involve the entire operation. It not only involves the Montana wheat, it involves local wheat as well.

Q. You have this same problem of watching your transit and policing the operation on your wheat that you buy and ship in by rail from Washington when you are selling it don't you?

A. It all fits together. It is an over-all problem, but it is dominated by the Montana situation which triggers it off.

Q. What it amounts to is the fact that if you make a sale of any product and you can use up this Great Northern Montana transit to get it there without any rate penalty, your problem is to see that that is used there. That is one [fol. 111] of your problems, isn't it?

A. It is to balance up our transit and to make sure that we make forward sales and deliver to the sales destination at an economical cost, which requires us to anticipate as well as a day-to-day operation.

Q. You've got to think ahead and be arranging your purchases of wheat so you have that transit available for your sales? And you also then have to fit your outbound movements every day, that is part of the work?

A. That is right.

Q. Isn't that same process going on at your competing mills?

A. I don't think so. It would be going on but to a much less extent because they have joint rates from Chester.

Montana, to points south of Portland, including California, and under these present conditions we are faced with abnormal conditions and the end is not in sight.

Q. Well now, isn't it a fact, Mr. Mikkelsen, that even with respect to your wheat that you buy in Oregon and Washington and mill in transit and which you could then move on through on through routes to California, isn't there, in fact, advantages in watching those transit items to make sure that you are applying transit credits that have a lower transit balance beyond Portland than other stations? Don't you have to police that?

A. Up to northern California, yes.

Q. Isn't it a fact that you do have wheat to your mill [fol. 112] in which you actually purchase and bring in there and mill in transit that will give you a lower transit balance beyond Portland to northern California and the bay area than would apply, than the transit balance that would be payable if you had the routes and rates you seek here?

A. Yes, I answered that in my last answer, that the use of some types of local transit is more economical to us in northern California than it would be to have a joint rate from Chester, but I guess I am not supposed to interject.

Exam. Boisseree: You can explain your answer if you think it needs explanation.

A. (Continuing) Our problem is that we can't buy the amount of hard red spring of the qualities we need on the Great Northern and compete with the mills who do have joint rates from Chester.

By Mr. Tjossem:

Q. Well, I just wanted to go into that some more. Now, for example, you do have this possibility, don't you? You are milling not only the hard spring wheat out of Montana but you are also milling the winter wheats to some degree, aren't you?

A. The winter wheats, as I think Mr. Welk will testify later, are very inferior as compared to the other wheat.

Q. Aren't you actually buying hard red wheat out of Montana and milling it?

A. From some grades of flour.

Q. Doesn't that go into California, too?

[fol. 113] A. Some of it does.

Q. Now, to the extent that you do that, I don't know whether you are prepared to say to what extent you do that, but to the extent that you do that, isn't it possible for you to buy those Montana Wheats, those winter wheats, on the Milwaukee and when you mill that wheat you either sell that locally, and then to move your flour milled out of your spring wheats bought on the Great Northern to California on that Milwaukee transit?

A. That is how we were existing prior to the 1955-1956 crop year.

Q. All right, so that you could substitute you take the Great Northern wheat, the spring wheat, and when you mill that you would then move that to California on a freight bill that showed an origin in Montana of winter wheat that originated on the Milwaukee, and you can move that to Los Angeles at a dollar and eighteen and a half cents on the through rate, can't you?

A. To the extent that we could introduce that type of wheat into our blends, but as Mr. Welk will point out here in a later exhibit, not only has the protein level and the variety and the gluten quality, and the bakery requirement has changed enough so that our use of those Montana winters which are available on the Milwaukee is not enough.

Q. Well, then to the extent you have that and you do mill that, you can make that substitution I have talked about?

A. To that extent.

[fol. 114] Q. Now then, in addition to that, with respect to northern California, and when I say northern I mean Fresno and north—

A. It would actually be, I think, Stockton and San Jose north.

Q. All right. You could buy wheat, say, from the Kansas prairie land, on the Union Pacific in Idaho, bring that in and move that wheat or the product to the coast and then substitute the Great Northern spring wheat and get into

California, into northern California on a cheaper basis than if you did have these rates and routes available to you when you paid the forty-six and a half cent transit balance on the through rate beyond Portland, isn't that right?

A. To the extent that we use those wheats again in those blends, but that is, as Mr. Welk will point out to you, the bakery flour requirements are required to have stronger gluten.

Q. I am not talking about your bakery flour going into California or elsewhere; insofar as you do mill those wheats for other markets you can make that substitution?

A. To that extent, yes.

Q. The fact is, by those and similar methods of substitution is how you have been getting into California on your volume of sales shown in Exhibit 15?

A. That is how we got by until 1955 and '56.

Q. And you say you don't think you can get by much longer?

A. We are under fierce handicap.

Q. What makes you think it is going to get any worse?

[fol. 115] A. We don't know, but we have no reason to think that the trend in production of hard red spring wheat in Montana, excepting for this last year, which did flip around, will be any different than it has been in the period beginning for the crop of 1950.

Q. Well, you increased your sales in California and the crop here in 1954, '55, didn't you, as I understand it, isn't that right? Your Exhibit 15 shows that you sold more flour in California in that year than you had in any of the previous four years, isn't that a fact?

A. We sold more flour; it was a lesser percentage of our total sales.

Q. The fact is, you did increase your sales in California, didn't you?

A. That is right, but the percentage of sales was less.

Q. That year you say was a very poor year of wheat in this same north central and central region of Montana, isn't that true?

A. And to a large extent all of the Pacific Coast mills were almost caught flatfooted. We had no idea, we were

under the very strong impression that the hard red spring acreage was down, but we didn't know it was as low as it was. We did not know then, and could not know then that the protein content and the gluten quality of the hard red spring would decline to a level where we couldn't use it.

Q. Well, I don't know if that is responsive. What I am [fol. 116] getting at is, as I understand your testimony, you said for that crop year, 1955 or '56, that this north central and central region of Montana, which you testified is essential to your mill's operation, did not produce a milling wheat that you could use for your baking flour in California, and even under those circumstances you increased your sales to California. Now, I am asking you, can you explain why that is?

A. I don't know. I would suggest that Mr. Welk testify on that question. He would have further knowledge of it than I do.

Q. It is still your testimony that this is essential to your mill, that you get this wheat out of the north central and the central region of Montana in order to maintain your bakery sales in California?

A. That is right.

Q. Even in light of the fact that when you couldn't get wheat through you increased your sales?

A. Sometimes mills make rather broad and large advanced sales even before they know what their supply condition is going to be. Unfortunately, the Pacific Northwest is a classical example of that. In July and August of 1955 the Pacific Northwest mills made larger sales percentage-wise to their year's business than they had in any previous year that I can remember. If the business is available you either sell it or you don't sell it and we sold our share, or tried to.

Q. Now, you testified if you were granted these through [fol. 117] routes and rates that you seek here, that it would be beneficial to the growers of Montana, is that right?

A. We think so.

Q. Why do you think so?

A. Despite the fact that we are now buying extensively from Great Northern origin points, as we must do, I am sure it is reasonable to say that we would likely buy more from the Great Northern points than we are now buying.

Q. How much more do you think you might buy?

A. I don't know, that would depend upon things we can't anticipate here.

Q. How close to capacity are you running your mills now?

A. I don't know. I should think that Mr. Welk would be the best witness.

Q. Have you any idea how close to capacity you have been running your mill in 1955-1956 crop year?

A. I have an idea.

Q. Well, approximately.

A. I think the question could be more suitably asked of Mr. Welk.

Q. Well, you see, I want to test your basis for saying you are going to help the growers of Montana. I want to know on what basis you made that statement.

A. If I may say so, I don't think it is necessarily so much as to what degree of capacity we are running as to [fol. 118] what kind of flour we are making and what kind of wheat we are making and where we are originating it, you see.

Q. Well, I think you have testified pretty extensively on that and I would like to get some idea how much, assuming, as I understand your testimony to be that these through routes and rates would help you, how much more capacity would you have available for additional purchases in Montana. I want to know how much you would go to capacity.

A. I don't think that I or anyone else could answer that question.

Q. Well, do you know approximately how close to a hundred per cent capacity you operated your mills in the 1955-1956 crop year?

A. I don't know.

Q. And you didn't take that into account, then, as to how close to 100 per cent capacity you may or may not have been operating in making your appraisal if you got these routes that that would be an aid to the Montana farmer? You didn't take that into account at all?

A. There might be some increase, but I don't think that is essential.

Q. You aren't relying on that as a basis? What is your basis that this is going to be helpful to the Montana grower?

A. Earlier in my testimony I said that we originated 35

to 52 per cent of our Montana Hard red spring on the Mil-
[fol. 119] waukee if we had joint rate on the Great Northern via our mills that we are seeking in the complaint we would likely buy more of our wheat on the Great Northern. We may not buy so much less on the Milwaukee, but we would buy more on the Great Northern and that would be that many more buyers.

Q. On the Great Northern, but wouldn't that also be a detriment to the grower on the Milwaukee? He would have one less buyer.

A. As I tried to point out—I don't know.

Q. All right. Do you think there is any lack of a market for the Montana farmer under the present circumstances? Do you think he is in dire need of a market, can't find a market for his products?

A. I would say that any time you have one more market, you have increased the market for the product.

Q. And it is to that extent you think you would be helpful to the Montana farmer?

A. Yes, sir.

Q. As I understand it, you thought it would also be beneficial to the California flour buyer, is that right, or consumer?

A. We think so.

Q. And will you state your reasons why you think that is true?

A. It would supply a broader basis for the California bakery and supply their flour.

Q. Do you think you could increase your sales in Cali-
[fol. 120] fornia if you had these through routes and rates over what you have been selling?

A. It would at least make possible a broader way of supply whether we were able to do the business or not.

Q. Do you think there is any lack of milling capacity on the routes now serving California as to cause any question as to whether they wouldn't be fully supplied with their needs for flour?

A. Not from the table we have here, no, sir.

Q. It would make it a little easier for you, as I get your testimony, it would make it a little easier for you to get into the California market with the Montana flours if you

had these routes and rates, you would be in a more flexible position?

A. We not only would be in a more flexible position, we would be in a more economical position.

Q. I was getting at that. Now, you say that a more economical position, you think that you could probably sell to a broader market down there at a lesser freight charge than you could today, is that what you mean by economical?

A. Somewhere in the business these costs are having to be absorbed.

Q. What costs?

A. The costs of maneuvering our transit and the lack of the joint rates from Chester, for example.

Q. You don't think you would have any work leasing [fol. 121] transit if you had these through routes and rates, you wouldn't have to watch that a third of a day?

A. The same as controlling all our costs and our competitive position, it is paramount.

Q. Well, I still don't know that I understand just how you say you are going to benefit. Is it the flour buyer in California you are going to benefit or the flour consumer you are going to benefit?

A. Well, presumably, if the flour, if the bakery is benefited or the consumer is benefited.

Q. So you are going to benefit them both, is that it?

A. The consumer indirectly through the baker.

Q. How are you going to benefit the baker?

A. By making available to him a broader supply of flour.

Q. You think he now—

A. (Interrupting) That is just about all I can say about it.

Q. I see, don't you think he can buy all that he now requires from the mills located on the present routes via Ogden, via Seattle and Portland into California?

A. Those bakeries, if they have five suppliers now will welcome a sixth.

Q. In the hope that the sixth will sell cheaper?

A. That he would give them better quality flour.

Q. That he would get something more for his money, isn't that it?

A. Isn't that basic economics?

[fol. 122] Q. Isn't that what you have in mind?

A. Yes.

Q. Now, when you say the transportation is not adequate for reasons that you have stated this morning, you mean by that it is not adequate because the rate which you would be required to pay if you used Great Northern billing clear through to California is more than what your competitors may pay, is that what you mean by inadequacy of transportation?

A. I believe we have the right of access to all of Montana.

Q. And the reason you don't have access is because you have to pay a higher rate?

A. Yes, sir.

Q. So that your complaint about your transportation is the rate that you have to pay ultimately, that is what you come down to?

A. That is right.

Q. So far as your transportation, yourself, the service that you get, the kind of delivery, the kind of equipment that you get, you don't have any complaint on that?

A. Under difficult car supply conditions we are always under pressure to get the highest quality of boxcars to move our flour, but that is a condition which we are not talking about now.

Q. As a matter of fact, if you got these through rates and routes that you are seeking here, that wouldn't remedy that one bit, would it?

A. I don't think so.

[fol. 123] Q. It isn't the boxcar shortage you claim. Is it inadequacy of the rates and routes? It still comes back to the fact that you want, and what you complain about here and which you complain is inefficient and which you claim is inadequate, is that you are required to pay this higher accommodation rate?

A. It is a prejudicial rate.

Q. It is the rate you are complaining about?

A. Yes, sir.

Q. Now, would you look at your Exhibit 15 for a minute. As I understand, the crop year 1955-1956 was a peculiar year, because that year the quality and protein of this

north central and central Montana wheat was way down, is that right?

A. Yes.

Q. How was the 1954 and '55 year for quantity and quality?

A. It was about normal. I would like—

Q. (Interrupting) And what about the 1953-1954 year?

A. There were variations, not only the protein content but the gluten quality throughout these years, but it was safe.

Q. For every year except the last crop?

A. That is right.

Q. During none of these years that you show on Exhibit 15 did you have anything other than the combination rates which you now complain about over Portland, isn't that right?

A. They were on change for the period we are talking about.

Q. This combination rate was in effect in 1951 and '52 [fol. 124] and all the years shown on this exhibit?

A. That is right.

Q. Now, since we have been going into these rates and your complaint about the present situation, do I understand—let me state it this way, I will state what I believe your position to be, then you can correct me if I have misstated it. You complain of the fact that you on your route must pay this combination rate Montana to Portland, Portland to California, but you do not complain that the rate from Montana to Portland, looking at that segment alone, or the rate from Portland to the California destination is unreasonable, do you?

A. The rate from Cut Bank to Portland is the through rate to all North Pacific Coast terminals.

Q. Let's just stop right there, then. Do you agree with me that that is a reasonable rate for the move from Cut Bank to Portland?

Exam. Boisseree: At least it is not involved in this complaint.

By Mr. Tjossem:

Q. You are not complaining that that is an unreasonable rate?

A. We are not.

Q. Do I understand then that you are also not complaining that the rate from Portland to, say, San Francisco and Los Angeles is an unreasonable rate?

A. I wouldn't know how to test it. I only know what [fol. 125] our combination structure is doing to us.

Q. My point is, you are not complaining about the rate from Portland to San Francisco and Los Angeles, as such, what you are complaining about, you have to use that rate in combination with the Montana-coast rate on your movements originating on the Great Northern?

A. Yes.

Mr. Tjossem: I guess that is all.

Exam. Boisseree: Redirect, Mr. Wettrick?

Redirect examination.

By Mr. Wettrick:

Q. With reference to your Exhibit 15, which has been touched upon a number of times, because your sales in California in '55, '56, were somewhat higher than in previous years, and as pointed out, that is the year when there was practically a failure of the production in Montana of of the hard spring wheat, wasn't it?

A. Where we normally originated.

Q. That, presumably affected you in the same way as it did others in getting their desired quota? You were confronted with the question of what you could do about getting into California, which other mills weren't, but again, that affected all the mills the same way, did it not?

A. Yes, it did.

Q. So you indicated that you had to go east of the central Montana territory?

[fol. 126] A. Right.

Q. And that is what you did, did you not?

A. Yes.

Q. That is what other mills did?

A. Yes, sir.

Q. And from the territory east of the central groups there the rates are higher, are they not?

A. Yes, sir.

Q. And you indicated that you bought a substantial quantity of wheat at Sidney?

A. A few cars.

Q. Which is served by the Great Northern, apparently, and the Northern Pacific, both?

A. I said the Milwaukee and I was corrected on it. I believe it is the Northern Pacific. I didn't take the time to check my map.

Q. Now, since you had to go into the territory east of the central group to get your high protein wheat, is it likely or do you know whether it isn't a fact, that in that way you actually got relatively more of the hard spring wheat tributary to the Northern Pacific and the Milwaukee than you would have in the territory farther west?

A. No, Mr. Wettrick, we only took a few cars off the the N.P. and off the Milwaukee in the so-called southern area; it was practically all in the northern area from Havre [fol. 127] to Bainville and the branches. The Hogeland branch and the Turner branch, did I understand you correctly?

Q. Yes, I think you did. I was trying myself to figure out, and I thought I had the reason there why your sales increased in California in 1955 and 1956 though the variation doesn't seem to be much different from what it was in prior years, but from this territory east of the central group the mills that have joint through rates to California also pay more than they do from the central groups, do they not?

A. Yes, sir.

Q. And I think you stated what rate they do pay from that group?

A. Yes, I did.

Q. And you stated that the rate—what was it again, from a point in that group to North Pacific Coast terminals?

A. As examples do you want more than one example?

Q. Take Sidney and you said it was ninety-six and a half cents?

A. Versus 58 cents to Minneapolis.

Q. Never mind the Minneapolis. Ninety-six and a half

cents and that applied to all North Pacific Coast terminals, including Portland over the route via your mills, did it not?

A. That is right.

Q. So that with the 72 cent rate from the central group, you are on the same basis as the other mills so far as reaching Portland is concerned?

A. Yes, sir.

[fol. 128] Q. But from Portland south the other mills in Butte and Ogden and Seattle and other points have a joint through rate from that eastern Montana group, do they not?

A. Yes, sir.

Q. And did you state what that rate is?

A. From Sidney it was a dollar twenty-nine.

Q. And that corresponds with a dollar eighteen from the central group, does it not?

A. A dollar eighteen and a half.

Q. And that indicates how much higher the rate is from that group and that is true so far as you are concerned to go to Portland, but when you go south of Portland then the local rate is added to your rate from Sidney, is it not, from Portland?

A. That is right.

Q. The same as it is when the grain originates in the central Montana group and that is seventy-seven cents to San Francisco and a dollar five to Los Angeles, isn't it?

A. Yes, that is right.

Q. Which made your rates from that territory instead of a dollar twenty-nine as you said the other mills in the northwest had, a dollar seventy-three and a half cents to San Francisco and two dollars and one and a half cents to Los Angeles, did it not?

A. Yes, sir.

Q. Now, whatever the reason may be, you meet that situation in the same way as you have explained that you had to [fol. 129] meet this situation generally through the exchange of billing, did you not?

A. Yes.

Q. Is the Washington, is the high protein wheat produced in Washington used in making flour for California?

A. To some extent. The higher protein of the dark hard winter that we use here is introduced in some blends that go into California.

Q. Yes, but they are not the highest grade of flour that is made by your mills, is it?

A. No, they are not.

Q. And that, as you testified, is available in limited quantities only, is it not?

A. Very limited quantities.

Mr. Wettrick: I think that covers it.

Exam. Boisseree: Any questions?

Mr. Tjossem: No further questions.

Exam. Boisseree: You are excused.

(Witness excused.)

Exam. Boisseree: Off the record.

(Discussion off the record.)

Exam. Boisseree: On the record.

Mr. Wettrick: We will call Mr. Welk.

PHILIP I. WELK was sworn and testified as follows:

[fol. 130] Direct examination.

By Mr. Wettrick:

Q. Will you state your name, please?

A. My name is Philip I. Welk.

Q. You live in Walla Walla?

A. Walla Walla, Washington.

Q. What is your position with the complainant?

A. I am president and general manager of the Preston-Shaffer Milling Company, Walla Walla.

Exam. Boisseree: This is the witness who will testify as to certain exhibits numbered for the record as Exhibits Nos. 19 through 25, inclusive, is that correct?

Mr. Wettrick: Yes.

Exam. Boisseree: I think at this time, with your permission and Mr. Tjossem's permission, we will adjourn until tomorrow morning at 9:30 a.m.

(Whereupon, at 5 o'clock, p.m., an adjournment was taken until 9:30 a.m., Thursday, October 4, 1956.)

[fol. 133] PROCEEDINGS

Exam. Boisseree: We are ready to resume the hearing. Will you proceed, Mr. Wettrick.

PHILIP I. WELK resumed the stand and testified as follows:

Direct examination (continuing).

By Mr. Wettrick:

Q. Mr. Welk, you are going to give some rather technical testimony later on about the milling industry and I wish therefore that you would briefly state your experience and training that qualifies you for the milling business and then state your various connections with the complainant.

A. In answer, yes, sir, I have had some experience in cereal chemistry. It dates back to my early training. I went to work as an apprentice cereal chemist in 1919, and during the period of my school work I worked in a cereal chemistry laboratory each summer and that was followed by concentrated study of cereal chemistry and between the years of 1923 and 1925 I was in charge of a cereal laboratory for the Northern Flour Mills Company, who at that time had their general offices in Portland, Oregon. In 1925 my experience turned to selling and administrative work in flour milling and I joined the company, the Preston-Shaffer Milling Co. through its then division the Pendleton Flouring Mill Company, later changed to Western Milling Company. That is now operative in the sales field only as a division. I became general manager and treasurer, I was [fol. 134] manager and treasurer of the Western Milling Company starting in 1934, and from the years 1934 to 1939, I was general manager and treasurer of the Preston-Shaffer Milling Co. From the years 1939 through 1947, I carried the duties of vice-president and general manager of the Preston-Shaffer Milling Co. and became vice-president and general manager in 1954.

Mr. Tjossem: You mean president?

The Witness: President and general manager.

By Mr. Wettrick:

Q. That is the position you now occupy?

A. I now occupy.

Q. The Western Milling Company with which you were connected at one time has been absorbed by the Preston-Shaffer Milling Co., hasn't it?

A. Yes, the Preston-Shaffer Milling Co. is a corporation which was incorporated July 1, 1911, and it subsequently operates the owned controlling ownership in the Peacock Mill Company and the Western Milling Company, and in 1938 they were joined into a single parent corporation; the Western Milling Company is now a division operating as such in tradename only.

Q. And where are the general offices of the complainant corporation now?

A. The general office is located at 113 East Alder Street, Walla Walla, Washington.

Q. Do you wish to give the milling capacity of your various mills separately or as a whole?

[fol. 135] A. We have three mills one located at Waitsburg, Washington, and the other at Milton-Freewater and one at Athena, Oregon, with a total mill capacity based upon a 24-hour-day production of 5,300 hundredweight. That is the total production; the Milton-Freewater mill is slightly larger than the other two.

Q. And what is the total elevator capacity adjacent to these mills?

A. The total elevator capacity is 740,000 bushels and those elevators are located at the millsites. We do not operate country or terminal storage as such.

Q. Now, you referred to the fact that the company at one time had a mill at Pendleton. What are the facts in that respect?

A. The company operated at two other locations from the years 1925 through 1947. We operated a mill at Pendleton with the capacity of 3,000 hundredweights. It had in connection storage of 275,000 bushels. That mill was totally destroyed by fire in July of 47. Also during the years 1929 and through 1933, we operated leased property at Salt Lake City, of 1,000 hundredweight and that mill at the mill-

site had an elevator capacity of 115,000 bushels. Our peak operating capacity during the history of our company was slightly over 7,000 hundredweights daily.

Q. Including all the mills you have mentioned?

A. All the mills I have mentioned.

Q. Or just those in the Walla Walla-Pendleton district? [fol. 136] A. That would include just the Walla Walla and Pendleton district. The Salt Lake mill was only operated for four years so—

Q. And that was about the capacity, that was about 1,100 hundredweight?

A. Correct.

Q. And without that you had, as I understood, you had in the Walla Walla area the capacity of around 7,000 hundredweight?

A. That was our normal 24-hour capacity that we carried on from the years 1933 through 1947.

Q. And the loss of the mill at Pendleton has reduced your capacity now to 5,300 hundredweight at the three mills you presently operate?

A. That is our current capacity. At the time of the fire those three mills didn't have quite the capacity they have today, but the emergency as a result of the fire necessitated, that was quite a loss, and necessitated our building up the capacity to the three remaining locations to the current capacity of 5,300 hundredweight.

Q. Now I wish you would explain the development of the flour business of your company with particular reference to the California market and the kind of flour that that market requires. The necessity for obtaining the wheat in question to supply it and things of that kind.

A. It is important to give some qualifying facts pertaining to our market and production history, and to do that I [fol. 137] would like to start with the year 1925, because it was that year, by reason of the study that we had made of the California market and by reason of the trend that appeared to prevail at that time, that we concluded to start the production at Pendleton totally with the thought in mind, the concentrated thought in mind, that production would be started and operated to fill the need of the bakery, commercial bakery need in the California market. Prior

to 1925 we had operated the three mills at Waitsburg, Milton-Freewater, and Athena, in a different field, that is, the family flour field, the soft wheat specialty field, domestically, and the export flour field, but in 1925 we moved into the bakery market and we moved into it because of these facts, and I shall now give you just a few quick facts on the development of the baking industry.

Prior to World War I most of the bread consumed in the United States, and particularly in the western territory, I mean the three states of California, Oregon and Washington, family flour was purchased and the housewife baked the bread, made the baked products. Then during World War I there developed the shortage of wheat worldwide, and some of you here will recall the expendancy of government restriction whereby wheat as such could not be ground alone; substitute stretchers had to be used to extend the supply through the use of barley and other grains, particularly barley. It had a very detrimental effect upon the re- [fol. 138] sulting baked goods of that flour.

It was at that point that the bakers really got a tremendous impetus in the distribution of bakery bread, because the baker had learned to use additives such as yeast food bromides and other items that he could make a well-leavened loaf of bread. With the substitute loaf flour the housewife didn't have that knowledge and this practice open to her. So there we have the development of the baking industry. It developed as independently owned, independently operated bakeries first. We had these prominent independent bakeries suddenly grow from the years 1915 to 1925, in such cities as Spokane, Seattle, Portland, San Francisco, Los Angeles, Sacramento and other large cities in the western states.

In 1925 there developed the trend of mergers, but before I go into that I want to state here for the record that the development of the baking business also developed the demand for Montana hard spring wheat quality. The commercial bakery was quick to recognize the quality of that particular variety of wheat and the result in flour, and as early as that period of 1915 to 1925, prominence was already gained by flour mills from that type of wheat. Then

the bakery mergers started up in 1925, and as illustration only, I name the Continental Baking Company, which was formed in 1925, which is our large merger bakery, one of the largest in the United States, and that was a general trend others followed very promptly thereafter. As these larger [fol. 139] bakeries concentrated their operations in larger plans, they also set up research departments, laboratory departments, technical assistance for their larger bakery production, and there again was emphasized the particular quality of this flour milled from Montana hard spring. We as a supplier to the market were taking under observation these departments and were planning our mill production to superimpose it upon the need of the market that was then, of course, effectively done through the use of Montana hard red spring, milling it at our mill locations and developing branded bakery flours such as force high gluten, full strength, wheat hex, Montana Patent, Western A, Bakers, Expanded A Wholewheat. I mentioned those brands briefly as the names themselves were characteristic or displayed the power or the strength and character of the flour and what could be expected in the result and the bakery product.

Those are quick facts of the market as it developed and as how we planned our historical operation to fit that market and need. That has continued through the years, as the population has increased bakery bread has increased in production, shipments of commercial bakery flour into California has increased and we have shared in that increase.

Q. And the large commercial bakeries are now baking the bread instead of the individual families?

A. The trend has been toward a processed food rather [fol. 140] than, as we see in many other foods today, the housewife wants her food as nearly cooked or baked as she can get it.

Q. Now will you explain how you developed that market from a transportation standpoint?

A. Yes. That market development was made possible, and we were not alone in this, this was also true of mills located in the Northwest, Oregon and Washington, we brought their wheat down into our mills, milled it into flour

and shipped it. To ship it in our case it went to Portland. There we had access to coastwise steamer service and at favorable rates. The flour was moved to San Francisco or Oakland or Wilmington or any other port that was available; for a long period of time we had favorable storage conditions at the dock at point of delivery, that is, the California port of delivery, and from there the movement was by reloading into a rail car, but generally delivery was taken on the dock by truck and the delivery made by truck.

Q. So that you developed your business in California originally through a water movement from Portland?

A. Yes. I'd like to refer, if I may, to the Exhibit 17 that Mr. Mikkelsen introduced yesterday. That exhibit shows flour movement into California by rail and water by regions of origin, through the years 1925-'29, and I mention that exhibit only to emphasize again the fact that that was our means of delivering flour to California, and while this ex- [fol. 141] hibit only goes through 1929, based upon our own movement, I say that that movement continued with some increases up until the grain case was decided effective as of July 1, 1935, which established favorable through rates into California for mills located at Spokane, Seattle, Portland, as well as those drawing Montana grain through Butte. At that point the coastwise water movement started moving into the background because these larger bakeries in many instances were right on sidings, the rail shipment would arrive with less handling. In the case of coastwise movement it was moving to the dock at Portland, handling it into the ship, out of the ship again at the port of destination, onto the truck, and finally to the bakery, whereas where the bakery was on the siding in California he would take rail delivery, the car would arrive as it had been prepared and properly defined at point of loading, generally speaking there was less damage and the flour was cheaper. So preference started to increase for rail delivery at that time, July 1, 1935.

Q. Well, and also the coast water steamship service disappeared, did they not, during the war?

A. Yes, that is right, and I might also say in respect to the entrance of rail transportation into California on flour from the Northwest, Oregon and Washington, that our com-

pany had truly expected to be included in the granting of the rate, the through joint rate on wheat originating on the [fol. 142] Great Northern or tributary to the Great Northern in Montana for delivery to California. We were included on such a movement on the Northern Pacific and Milwaukee origin, but we were not included in the Great Northern movement to our mills only to the extent that the delivery of the through rate terminated at Portland. The spirit of the Commission ruling there opened up the existing routes and it was upon that basis that we had expected to obtain that ruling, but those are the facts as they existed. In competition to this all rail movement it was necessary for us then to find ways and means of delivering our flour to California. The railroads had defined a port-to-port rail rate that was slightly higher than the Portland to California on the joint through rate, but it was available to us and it was used extensively by us and while the rate was somewhat higher under those competitive conditions which existed then, which are not as severe as they are today, we were able to absorb that difference and remain competitive in the market.

Q. You really don't mean "competitive", you mean remain in the market?

A. Remain in the market. Our price remained competitive only because of our absorption of the penalty.

Q. So you were confronted then with a new situation that presented a very serious problem, were you not?

A. That is correct, sir.

Q. What efforts did you make to bring about a remedy [fol. 143] for this situation?

A. Our first efforts were directed towards contact with the officials of the Great Northern. A request was made to have this through rate from the Great Northern prevail through our mills into California. Many, many contacts were made by the individuals through the president and vice-president of our company during that period of time. And I would like to now turn to and present Exhibits 19, 20, 21 and 22.

Q. As I understood you, there were personal negotiations between the office of your company and the Great Northern

seeking to bring about the establishment of joint rates via your mills to California?

A. Joint through rates, right.

Q. And you are now coming up to Exhibit No. 19 in which you put in concrete form in a letter your request for the establishment of joint rates?

A. Yes, our objective there was to have the carrier establish voluntarily the joint through rates. We were assisted in this request to the Great Northern by contacting and discussing the matter with the officials of the Union Pacific Railroad, the Northern Pacific Railway, we were seeking ways and means of obtaining this voluntary joint rate. And on January 13, 1948, as evidenced by Exhibit No. 19, I wrote to Mr. C. E. Finley, vice-president, traffic department, Great Northern Railway Company. The letter is exhibit in total.

[fol. 144] The Witness: Mr. Examiner, could I just read one or two paragraphs of that letter? Would that be imposing too much on the record? I don't want to draw this thing out.

Exam. Boisseree: I don't see any particular purpose in it, Mr. Welk, unless there is something that you want to, some explanation. The exhibit, the letter, will speak for itself and I can assure you it would be just duplicating what we have already, would it not?

Mr. Wettrick: I was going to ask Mr. Welk to refer to certain parts of the letter because it indicates that at that time the same situation existed and the efforts that were made by the company to induce the Great Northern to establish the joint rates and also to present facts which the witness would otherwise have to go into. In other words, this sort of summarizes this phase of the case.

Exam. Boisseree: Well, I don't want to interfere with the presentation of your case unnecessarily, but I don't want any duplication in the record and if it is merely going to be a reading of the exhibit itself already subject to you offering it through the witness and no objection, no valid objection, it will be received in evidence. However if it is going to be very brief and he is going to make some ex-

planation of it subject to objection by Mr. Tjossem, we are not saving any time in the record by discussing it now.

Mr. Wettrick: Will you do that, Mr. Welk, having in mind [fol. 145] the Examiner's wishes.

A. First, let me emphasize, then, the dating of the letter because of the importance of the continuity of the problem. From July 1, 1935 all the way through January '48 we were dealing with the problem, we were seeking a solution to a very, very important problem to us and which we again outlined in 1948, advising of the competitive problem that this posed to us as against mills located in Spokane, Seattle and Portland. Constantly seeking from the carrier a voluntary act to meet the need that was prevailing over this period of time. I think that is sufficient explanation on that point.

By Mr. Wettrick:

Q. Without reading any part of the letter then you pointed out in it substantially what has already been said, have you not, did you not, that it was very necessary and important that you should be—

Mr. Tjossem (interrupting): Just a minute, Mr. Wettrick.

By Mr. Wettrick (continuing):

Q. —able to draw grain from points on the Great Northern?

Mr. Tjossem: This is just repetitious. He is merely now trying to summarize and I submit it is leading.

Exam. Boisseree: The objection is sustained. The exhibit will speak for itself its testimony.

I think it is repetitious, Mr. Wettrick.

By Mr. Wettrick:

Q. Did you receive a reply to that appealing letter?

[fol. 146] A. Yes, that reply was dated February 27, '48, as shown by Exhibit 20, in which Mr. Finley states the fact that they are awaiting a decision on I.C.C. Docket 29515.

Q. That is the General Mills Case?

A. Right, and we considered that a reasonable reply and gave the necessary time for that development.

Q. Did anything happen after that case was disposed of so far as correcting this situation is concerned?

A. We were not given any correction to the problem or to our request for correction. Additional conferences took place. I am referring particularly to a conference with Mr. O'Brien in St. Paul. The matter was generally reviewed, rather, in detail and the Great Northern was kept constantly aware that the problem was growing progressively worse for us and that our need for the correction was becoming progressively greater.

Exhibit No. 21, dated May 4, 1956, is a relatively current letter to Mr. Finley on the same subject. The purpose of that letter to Mr. Finley was again to present a plea to the Great Northern Railway for a voluntary correction or a voluntary instatement of the joint through rate for milling in transit at our mills.

We go to Exhibit No. 22 which is a letter from Mr. Finley to me as president of the Preston-Shaffer Milling Co., declining to establish this voluntary rate.

Q. And the date of that?

[fol. 147] A. May 22, 1956.

Q. The letter from your company was designed to finally determine whether some voluntary action might be taken by the Great Northern, was it not?

A. We wanted to leave nothing undone for the record and nothing undone with respect to analysis of the problem to see if it could be solved through a combined agreement or effort on the part of the carrier and the shipper. It was a pursuit of voluntary action, a desire to meet the problem through that procedure.

Q. Now, Mr. Welk, I wish you would explain rather fully the question of the quality of the wheats produced in Montana, particularly the hard spring wheat and why it is necessary that it be available to mills supplying the California market.

A. I want to give some facts on this matter of quality since the fundamentals of this decision are wrapped up in

the marketing of flour and in order to market that flour we must consider the specific market need, and if I may say, it becomes a consideration of the carrier because the specific market need and the ability to fill that need are in effect what makes the movement possible and what enables the cost of transportation to be paid. I don't want to get into technical review on quality, but I should like to emphasize the part or influence that it has on the movement of flour in these western states.

[fol. 148] If you will just briefly turn to Exhibit 6 that Mr. Mikkelsen had before you yesterday, he visually portrayed to you results on winter and spring wheat wherein one quantitative measurement of quality was made and that quantitative measurement was protein content. Quantitative measurement of protein content is a most important measurement or definition of wheat but it is not the basic determination upon which a buyer decides whether he will accept or reject his purchase. It is a guide but the basic quality involved in wheat is based upon a qualitative determination, not a quantitative determination, but a qualitative determination. In the technical logical development of the past 30 or more years the cereal chemist in conjunction with agronomists and wheat breeders and others interested in the qualitative grain have sought a means, first of measuring this quality and then, secondly, how they might make it available. Various pursuits developed finally in one measurement of quality and it is only one measurement but I am producing it here for the record in Exhibits 23, 24, and 25.

The Witness: I refer, Mr. Examiner, to those three exhibits because the three exhibits were defined by the same method of qualitative measurement.

By Mr. Wettrick:

Q. Would it be in order at this time to state what that qualitative factor is called, or element?

A. Yes, I will give a brief explanation of this. As I say, I don't want to get technical. This was put in here simply [fol. 149] for the purpose of showing that we have mechanical measurements of the quality that we are talking

about. We have them, the grain grower has them, and the flour buyer has them. This is a mechanical device known as the Brabender farinograph. Simply it is this: A quantity of flour is placed in a very small mixing bowl, sufficient water is incorporated to bring out a dough with true absorption and then the knives in that small mixing bowl are started and we have the processes of gluten development. The chart that you see before you is made by a needle starting at the bottom line which is in minutes and as that machinery continues to operate one, two, three, four, five, six, seven, eight minutes and so on, the needle records what is taking place in that mixing bowl. It is recording the resistance that that dough is throwing up to mechanical development. Now, briefly, a flour that is weak shows a very rapid hydration of the water. By that I mean the needle moves up to its top line very quickly and as the flour shows its weakness in the form of reverting into a batter, the resistance drops down and the needle drops down with it.

Q. As shown by what?

A. As shown by Exhibit 23 which is an example. I am not trying to define any variety here or any place of origin, I am simply defining a relative like weak bread wheat.

In Exhibit No. 24 I am showing by the fact that the hydration was longer, the needle took longer to reach its [fol. 150] peak and the needle showed that the resistance that the dough gave continued to throw out the resistance and there was a gradual continuation of the needle showing that the dough was not liquefying or breaking down, that Exhibit 24 represents a reasonably good strong bread wheat.

We turn to Exhibit No. 25 and it doesn't take a technical mind to see the difference that the point we are displaying here is that in No. 25 we have the type of quality no matter where it comes from, whether it comes from Montana or from Nebraska or whether it comes from winter wheat or spring wheat this is a type of a qualitative analysis that the buyer of bakery flour in California for certain specialty goods is looking for and this is a procedure of qualitative measurement and there again we define the fact that there was a slow hydration of that dough. The dough continued

to develop boldness and strength and maintained that, showing very little decline from the point, or the peak reached by the needle on the chart to where there was a slight decline, but only a very slight decline as compared to the one of medium strength or the one of weak strength. I hope I have made it clear that I am portraying here a qualitative measurement that has come into use as a means of telling the grower what to grow, a means important to the flour buyer to tell the flour miller what he wants for his outline bakery production and what he wants to build in a particular type of bakery product that he feels he can [fol. 151] sell in volume in domestic market.

Now we will leave those exhibits for a moment and I am still on this qualitative subject, bu I would like to define briefly what brought this about and why this thing is becoming progressively more so. As we got into these larger bakeries they immediately were confronted with a distribution problem of their baked goods, they had to get it to the housewife in some manner or other and there were various means accepted. One was a house-to-house service, and we still have house-to-house bakeries. By that I mean the bakery wagon owned generally by the bakery. It is driven to the apartment or to the house or to the housewife and makes the sale at that point, but generally speaking, the bulk of the bakery bread is sold either through a grocery store, a so-called chain store, but whether it is a chain store or a grocery store the development of self-service stores has come into being so rapidly that the baker has had to recognize that the point of sale of that bread was when the buyer picked up the loaf or was drawn to it because the bread is branded there is competition at the point of sale by the fact that they have a shelf, shelf space is at a premium, the store allots only so much shelf space. All this has to do with the quality of this flour so they are given a certain amount of shelf space, they have to pile one loaf on top of the other. Now, then, what must that bread perform to make the sale at that point? It must have a soft [fol. 152] touch to see if it is fresh. Freshness has been given a tremendous impetus, enticing if it is soft, she feels it is fresh, yet that bread has been stacked one on top of another and we have the term known as stackability of the

bread, which is based upon the strength of the gluten, not the flour from which it is made, so the baker says we want a flour that will make a soft loaf, simultaneously we want a flour that will have sufficient strength so when the loaf is soft it will have firmness or response to weight or pressure. Thirdly, we want a flour that we can make a large loaf for the larger loaf for a given weight of dough, the larger the loaf the more the buyer thinks he is getting for his given sum of money, so we have developed a large pan size, we have developed a large loaf of bread and we have developed stackability, and freshness or softness by which freshness is measured.

Then to get this bread from this large bakery to the self-service store the baker by the development of highways has gone into the transport business. Much of the bread that we eat is transported from these central large bakeries to within a set of distributing points where the smaller trucks picks it up. The bread has to go into that transport and resist damage of transportation in the transport truck. There begins, because you have all requested a loaf of bread, it is the ability of that loaf of that bread to spring back, is the strength, the inherent quality of the wheat that [fol. 153] was used in the production of that flour. It so happens that winter wheat by nature of its variety and its strength, the growing period and the condition under which it matures is a softer, weaker wheat than the hard red spring. I am reminded of General Mills' testimony in which they presented this same problem but not in the scope that I am presenting it because since the General Mills Case the factors that I speak of have come into being so rapidly and we seem to be at the point of a new horizon in this matter of what the baker needs to develop his market or to do what he thinks is necessary to increase his sales. This is a trend that has developed very rapidly and the demands made upon the flour miller in this respect are greater today, more greatly emphasized and we have reason to believe that each time they will be further emphasized because we haven't reached the point of perfection that the buyer of bakery flour expects or feels can be reached. This is a very important subject and from the standpoint of transportation I would like to make this reference, Montana

isn't the only area that has come up with a wheat that registers this desirable qualitative measurement. Wheat breeders in the southwest have been very active, the Nebraska Crop Improvement Association has been very active, it is evidenced now by the fact that today flour is being shipped in sizable volume to California bakeries, milled in the state of Kansas, milled from southwestern wheat and on the basis of this qualitative measurement is offering us com- [fol. 154] petition to the extent that price is not the deciding factor. They're bringing this flour out from Kansas because they feel they are making a better, more salable, more progressive loaf of bread than the flour we can furnish them on flour mills either through Great Falls, or mills in Spokane, Seattle and Portland.

Therein I emphasize this point of use and the delivery of flour in the California market is becoming rapidly dependent upon a qualitative measurement of that flour. We ourselves, in seeking sources of supply have been users of Kansas wheat and Nebraska wheat and which we bring out here on the dollar eighteen and a half cent through rate transited at our mills for delivery into California. That rate applies via the Burlington, Laurel and the N. P. Isn't that right?

Q. Yes, I think that should be emphasized. You say that wheat can move from points in Nebraska?

A. And Kansas.

Q. Via the Burlington and the Northern Pacific through Northwest gateways to California at the rate of a dollar and eighteen and a half cents same as the rates from the point of origin direct to California, is that correct?

A. Correct.

Q. Is that wheat available to your mills?

A. That wheat is available to our mills and we are using that wheat, in a lesser portion, it is true, but we have been [fol. 155] using it for the last three years.

Q. And that has—

A. In an effort to offset this Kansas competition.

Q. And to overcome your disability in having to pay combination rates from points on the Great Northern?

A. Correct.

Q. What is this qualitative factor that you refer to in

connection with the wheat, what is the, what is it called? You mentioned it once or twice but didn't emphasize it, yet it is frequently referred to.

A. It is the gluten strength generally referred to as gluten strength of the flour known to be prevalent. We have known about it for many years, from the time that perhaps the individual took wheat in his mouth and chewed it and came out with a substance known as gluten. He knew it was there but it is, it has only been in relatively recent years that we are getting any qualitative measurement; we had a quantitative measurement of it and have an accurate one in the protein determination and generally referred to it but I might emphasize this point that in the area in Montana where wheat is grown and that wheat is trucked to elevators located on the Great Northern Railway, hard red spring I am speaking of only, there is spring wheat, by that I mean there is spring wheat of a lesser qualitative measurement and spring wheat of a higher qualitative measurement.

[fol. 156] Q. Though most may be of the same protein content?

A. Content and the same variety, the only difference being the qualitative measurement. And we will then necessarily for certain market needs have to reject one and accept the other and in that avenue which we can only measure the future by what we see currently, that thing is being amplified so rapidly that it is going to have its effect in the market place because the wheat with the higher quality measurement is going to demand a premium over the same variety of the same protein level with a lower quality measurement.

Q. I wish you would be a little more specific as to what the significance of what you have been discussing and what is shown by these graphs, Exhibits 23 to 25, as to your situation in this case.

A. Our specific situation is that the buyer places before us certain demands, certain performances, he has an accurate measurement of that performance. He defines it to us, he tells us this is what we must have if we are to buy your flour. Then our own problem, the problem of our own chemists, the problem of our grain department is to

originate grain that will meet the requirements set forth by the baker either by using that wheat straight or blending it with some other wheat, but we have to have sufficient amount of qualitative measurement in that grain or if we don't reach this level set by the buyer, then we don't meet his specification, he either turns the flour down, he won't [fol. 157] buy from us any more, he turns to some other mill or some other area where that specification can be met.

Q. And where do you find that?

A. We find that wheat prevailing for the specifications that we have on our flours and which have been set by the user, we find that wheat to prevail in greater part in that north central area. I might refer to it as that area of the high line between Shelby and Havre, we find it to prevail east of Havre.

Now while that subject is here in testimony here yesterday we referred to the '55 harvest condition as being not normal, and we found this qualitative measurement didn't meet specifications in the triangle that year, but we did find that as we went east of Havre that wheat had matured under a different condition and did meet the specifications and it was necessary, as Mr. Mikkelsen testified yesterday, to draw a large part of the grain that we used from that harvest, from that territory in the northeastern section of Montana, and we had to go there because the greater supply existed of this wheat that met qualitative measurements and specifications.

The Witness: I am not trying to extend this thing too far. I am trying to make it clear. It is rather a technical point.

By Mr. Wettrick:

Q. Well, it indicates, doesn't it, Mr. Welk, that the requests are becoming more refined all the time as this business of making bread and flour is developed?

A. The specifications are becoming more and more rigid [fol. 158] on the part of the buyer.

Q. Now what is the difference between the Montana hard wheat, Montana winter wheat and the Montana spring wheat in the respect that you have been talking about?

A. Well, the Montana winter wheat would fall into the area of weakness shown by Exhibit 23. The dough made from a winter wheat flour doesn't have the elasticity. It is oftentimes referred to as a mellow gluten. It is used in family flour, it is used in blend of bakery flour. There are certain phases of commercial bakery production where that type of flour can be used fairly satisfactorily but that field is diminishing as these larger bakeries, more conscious of research, are raising their specifications of qualitative measurement in their finished bakery product, are obtaining a greater acceptance, the baker feels he must follow his competition and it is rapidly becoming a specification in all, in most, let me say, to be accurate, in most bakery flour that if this type of winter wheat is used it can't be used alone, it has to be bolstered or corrected. The weakness or mellow deficiency has to be corrected by the incorporation of a stronger wheat, a stronger quality wheat in varying amounts depending upon what the specific might be. So on the one side, you have the winter wheat mellow, soft, smaller loaf volume, coarser grain, not retaining freshness, the undesirable features of the loaf of bread. You have on the other hand, the qualitative measure-
[fol. 159] ment, as displayed by Exhibit 25, you have the firmer loaf, the softer loaf, the important eatable loaf, the more stackable loaf, the one that stays in shape longer, all of the things I have emphasized, that is the difference.

Q. And I was hoping you would also say, if I understand this correctly, that the Montana winter wheat is low in gluten quality while the hard spring wheat has at least a better or higher gluten quality, has it not?

A. Yes.

Q. And as indicated by Exhibit 6 the hard spring wheat is generally of higher protein character, is it not?

A. I might say that the protein content is not entirely a qualitative measurement, but generally, this is the general statement that the higher the protein generally because of the greater percentage of it there will be greater qualitative measurement, but that is not always true as evidenced a moment ago, you might have two of 14 protein, you might have two of 15, you might have two of 16 con-

tent, yet you would have a wide variation in the qualitative measurement of those two spring wheats.

Q. Let me ask you this: Does the flour you produce and market in California generally represent what is shown by the graph which is Exhibit No. 25?

A. That would not be accurate because in trying to emphasize the point that industry has a mechanical qualita- [fol. 160] tive measurement I have selected extremes, in Exhibit 25, that is an extreme that comes very nearly to the ideal that we seek. We could not set a standard specification because day to day and month to month we couldn't meet that, the availability of quality measurement wheat, the availability would not be there for us to set a specification that high and guarantee the underwritten guarantee, but that represents the ultimate that we are seeking and we do have a measurement for it.

Q. What you just said there is generally true of most mills is it not?

A. We are together in this.

Q. Now, Mr. Welk, I wish you would say something about the competition your mills meet in the California market with other mills in the Pacific Northwest and Utah and the necessity for having the same rates as they have if you are going to compete.

A. By reason of the fact that the milling industry is a heavy tonnage industry it is general knowledge based upon financial statements that have been published yearly by the larger milling companies, that the margin of profit per hundredweight of flour milled is very, very small, exceedingly small compared to the unit sales of other industries. There are only one or two industries that would measure down to the margin of profit per unit that we operate under. The fact does remain, however, that the volume of production is large and the industry has lived with this small margin of profit per unit. It has become [fol. 161] a strong industry upon that basis, but it is also highly competitive. A carload of flour today represents a large sum of money. You have the buyer that has to protect his interests from the standpoint of material cost because once he takes our raw material he reprocesses that and invests a large amount in the way of labor and capital

investment, additional distribution cost, wrapping cost and various other costs, so he feels he must buy his raw material on the very best basis. However where ten years ago the prevailing decision at the point of sale of flour was price, with ample provision made to the reputation of the mill, the quality of the product, the decision was heavily to price. Today, the decision rests heavily to the qualitative measurement of the flour or the specification that the baker places upon it. He will sometimes pay a small premium for that, at least he will give the business to the mill that he is convinced can not only offer that specification but rigidly maintain it. So that brings us to the simple point that the margin is small, we must have the qualitative measurement, and then we must be able to deliver that to the buyer on the basis of adequate and competitive transportation costs. And to that extent we are showing here where the limitations are involved as regard our company.

Q. Did you have some comment you would like to make in regard to Exhibit 2?

A. I would like to verify Mr. Mikkelsen's statements of [fol. 162] yesterday. I have been familiar with him in the preparation of these exhibits. It won't take very long, but I would like to briefly go over several of them with maybe just a single comment or two as we approach them.

Let's turn to Exhibit No. 2.

Exam. Boisseree: Let us take a short recess.

(Short recess.)

Exam. Boisseree: On the record.

We are ready to resume, Mr. Wettrick.

A. (Continuing) We were referring to Exhibit No. 2. The important factors of the exhibit were brought out yesterday, but I just wanted to bring emphasis to this factor and that is that the exhibit shows the area of the winter wheat moving northward but it also shows that spring wheat is continuing, to be some spring wheat raised in the area tributary to the Milwaukee and the Northern Pacific and it could be presumed the total acres and total

bushelage there would be ample to supply such an operation as our company. I point that out because there might be conditions when that spring wheat would not measure up to the specifications that I have covered in considerable detail. Just as the spring wheat in the triangle didn't measure up last year I point that out because there was an inference that while the winter wheat was moving north there might be ample, but there isn't, there isn't the collectivity and there isn't the availability.

[fol. 163] Q. And you haven't any priority on it so far as buying that grain is concerned compared with other mills?

A. None whatsoever.

Q. You have to compete with them in buying, do you not?

A. Right. Exhibits 3, 4, and 5 having to do with the production of hard red spring and hard red winter wheat I would like to broaden the testimony here by bringing out one more point and that is the availability of hard red spring wheat is coming under the direct influence of acreage allotments as administered by the Agricultural Act. In 1953 the harvested acreage of winter wheat in Montana was 1.425 million acres. The spring wheat was 4.631 million acres or a total of right at six million acres, that is the total acres harvested in 1953 of both spring and winter wheat. In 1956 the allotted acres, this is the allotted acres, this is what the farmers were told they could seed if they stayed within the allotment and thereby gain the benefits under the law, they could seed four million acres. There was actually harvested 1.1 million acres of winter wheat, 2.7 million acres of spring wheat or a total of 3.8 million acres. See that is slightly less than the harvest that was apparently due to weather conditions and so forth. But the point I am making here is the total acres were cut from six million to four million through the allotment, so we have a lesser total to work with and then as that lesser total becomes winter wheat or if the trend is toward [fol. 164] more and more winter wheat, as the testimony has shown, that it is then the availability of the hard red spring within the state of Montana is again sharply reduced. Then you take what is left, by that I mean, the hard red spring wheat that is produced and again cut that

supply down on the basis of measurable quality, the part that can be used and you then bring in a phase of competitive buying for the reduced quantity or the reduced availability of the selective type of hard red spring that we are talking about.

On Exhibit 6 we brought out quite thoroughly yesterday the reasons why during the crop of 1955 we had to go out into this northeastern territory, that is, the territory between Havre and Bainville on the Great Northern. During the testimony the point of Sidney was mentioned and it might have been inferred that we could have gone to Sidney which I think it was confirmed as being on the Northern Pacific, it was inferred that we might have gone to that area for our wheat. There were a few cars available there but the heavy producing territory where a selection could be made on the basis of quality measurement was found to be between Havre and Bainville.

I am going through these rather rapidly but I just had brief comments on them, Mr. Examiner.

Exhibit No. 7 had to do with wheats grown in Washington, Oregon and northern Idaho, and then we have in Section Part B statements showing the estimated hard winter [fol. 165] wheat production in Washington, Oregon and Idaho. I want to emphasize just this one point in respect to that and that is we too are losing a desirable wheat in the hard wheat producing area of eastern Oregon and eastern Washington by reason of the fact there are influences causing the grower to plant other varieties. In the crop year of 1956, and adjacent to our mills we can only draw from Adams and Franklin Counties because that is the pocket where there was produced by the 1956 harvest a quantity of dark hard winter wheat that was 12 per cent or better, but our own estimate based upon the acreage and our protein checks, it is our estimate that the production will not be much, if any, above two million bushels and that includes Benton County which is a backlog to our mills. I am emphasizing that point while we are located in the heart of wheat acreage, the nearby wheat is not available for the job that we have been doing and hope to continue to do.

Q. And that hard red wheat that you just referred to is available to all of the mills in the Pacific Northwest the same as it is to your mills, is it not?

A. That is right, there is competitive bidding for that wheat.

Exhibits 11 and 12, in those exhibits we have included the matter of flour production in the Northwest as well as California and Utah. The competition from Utah should be brought out here as affecting this case and in previous testimony I said that the grain case of July 1, 1935, made [fol. 166] available wheat through the Butte gateway for mills at Ogden and Salt Lake City. We had just pulled out of there prior to the decision of that by reason of the fact the flour that we were producing at Salt Lake we were hemmed in with only that dark hard winter wheat and alone it would not make a desirable bakery flour, it wouldn't, in fact, we were taking flour back and we were having quite a time and for that reason we pulled out of there in '33. The decision of the grain case was being delayed and our board of directors felt that we couldn't stay with it, but shortly after that when the Montana spring wheat became available as a parcel blend with the Utah dark hard winter and southern Idaho dark hard winter, the picture changed immediately and we had a response as indicated in Exhibit 11. This only goes back to the '46-'47 period but it does show an increase in capacity from three and a half million hundredweights up to five million hundredweights. Up to Utah it shows an increase in capacity from 4.9 to 5.8 in California. Of course the California mills had the use of that through the northern gate, but the Utah mills definitely increased their capacity because they were able to get that Montana wheat during the time when the production in Oregon, Washington went down. I wanted to emphasize that point because of the competitive angle, competitive to our company and the prices being set by the mills at Ogden and Salt Lake City.

To further emphasize that on Exhibit 12 is the fact that [fol. 167] the Utah mills with the capacity of five million hundredweights come up with, according to this exhibit, annual flour production capacity they show five million nine hundred four thousand and they show the actual

production of five million and those mills also have available to them eastbound market movement. The point I am trying to make there is they are operating even with their increased capacity at very nearly a hundred per cent. I wanted to make the point that competition is growing, it is operating to capacity and is a factor in the market.

I will go past now to Exhibits 16 and 17 and I will make only the comment there that this shows, Exhibit 16 shows, the rates to San Francisco and Los Angeles, rail-water, all rail and then it also drops down into section 2 showing the through rate and the port-to-port rail rate. That port-to-port rate was a rail rate. I wanted to emphasize that while only those years are shown, and on Exhibit 17 only 1926 through 1929 are shown, that the subsequent years from 1929 to 1935, the trend was a continuing one of increased water movement until the all rail took over.

The Witness: Excuse me, Mr. Examiner, I am going back one exhibit, I would like to back to Exhibit 15.

A. (Continuing) This has to do with my company's with this company's volume of flour sold to California. In this exhibit it shows that there was a gradual increase in sales by our company from the year 1951, with one exception of [fol. 168] '54 where we dropped down, there was a gradual increase in the total hundredweights of flour sold into the California market. That exhibit tended to create the fact that the condition under which those sales were increased the environment was favorable to our company and I want to point out that the exhibit is accurate, but I also want to point out that during the period of that exhibit we had first the population increase in California, which was considerable, we also had favorable opportunity for the judicious process of billing substitution by reason of the fact that we had a favorable market in Portland and the valley south for mill feed. We were doing a substantial volume of export flour through Portland, loading it on steamers there and we were successful bidders on a large volume of quartermaster flour which we bid for delivery at Portland. And our successfulness in those field made it possible for us to increase these sales, but they are limiting factors even though we have had a degree of success

with them, they are limiting factors, factors that could suddenly change and be eliminated almost completely and should be brought out because they are factors that are true and might mislead the exhibit.

By Mr. Wettrick:

Q. And, Mr. Welk, is there back of all of that the determination that you are not going to be driven out of the California market if it is at all possible to hold on to it?

A. Our capital investment in our mills, our establish-
[fol. 169] ment of our employees in their communities, the customers relationship that has been established, the investment in the continuity of our brand, all those things are basic investments our company should be entitled to retain. It is within the market and we are going to do all we can, we have shown our intent, we have shown our absorption of penalties, simply because we believe that we are entitled to and at some further point we will obtain an adequate and economical transportation into that area.

Q. So far you have held your ground largely by what you called a moment ago a judicious process of substitution and switching of billing, is that correct?

A. Right.

Q. Which is the expression used by the Commission in the General Mills Case?

A. There was something to that effect. I don't know if it was accurate or not, but it was to that effect.

In Exhibit 18 we are on the same subject of substitution of billing. Just to set the record straight, I wish I could refer back to the record, but with the absence of that it was implied that on flour for delivery to northern California that a lower combination rate was available than the joint through rate originating on either the Northern Pacific or the Milwaukee. If that did get into the record that was in error. I think the point that was being emphasized was
[fol. 170] this, that on billing originating in Oregon and Washington, and upon which there would be a substitution of transit made that that through joint rate to points in northern California, Stockton, San Jose and north, the through rate is less than the joint rate over the Montana

Northern Pacific, Milwaukee. That is a lower, lower rate over Portland it the transit balance is lower over Portland, however, that is a substitution that is available to and is being used by competitive mills in the Northwest. I thought there might have been a slight misunderstanding there and I bring that into the record purely to correct that. Also I want to leave in the record that under this matter of substitution of billing that on our shipments to southern California which has already been defined, on our shipments to southern California we have to and must originate Milwaukee or N. P., or we can't get down there competitively with our shipments, that is number one on the transportation and number two on the qualitative angle even though we originate the Montana N. P. origin billing, we may still have to resort to process of substitution to effect a supply of qualitative wheat that we have been speaking about. And by the same token to northern California we are presented with this substitution of transit to get down there on the most economical rate. However again we are confronted with our need for this special specific type of wheat and it has been well defined and there we also have to make a substitution in order to get to [fol. 171] first make in our mill a blend that will go to market. Stating that the mills in Spokane, Portland and Seattle have these advantages. I think that covers all of the exhibits, I don't think I have left anything out.

Q. Now, what would you say about the adequacy of transportation under the rates with which you are now confronted?

A. In summary I would say that it has been shown factually that the transportation as it exists today it is not adequate for us to compete in our historic established market. That if we attempted to stay there under current conditions we have imposed upon us limitations that create costly transportation, to some extent wasteful transportation. It imposes upon us a handicap which our competition in the Northwest and in Ogden and California do not have. And to that degree it certainly affects public interest as our company defines public interest.

Q. I think that covers the situation.

Exam. Boisseree: Will you offer the exhibits.

Mr. Wettrick: Mr. Examiner, that concludes the witness's direct examination and I now offer in evidence the exhibits which he has identified and referred to, being Nos. 19 through 25, inclusive.

Exam. Boisseree: Any objection to the receipt of those exhibits, Mr. Tjossem?

Mr. Tjossem: No objection.

Exam. Boisseree: Exhibits 19 to 25, inclusive, are re-
[fol. 172] ceived in evidence and I take it the witness is now available for cross-examination, Mr. Tjossem.

(Complainant's Exhibits Nos. 19 through 25, inclusive, Witness Welk, were received in evidence.)

Exam. Boisseree: Mr. Tjossem, will you proceed.

Cross examination.

By Mr. Tjossem:

Q. Well, let's start with this last statement first, Mr. Welk. You say you feel that under the present situation there is wasteful transportation. What do you mean by that?

A. For whatever reason transportation is interrupted it is more costly to the handler of the commodity than if it is not interrupted.

Q. Where is transportation interrupted under your present system?

A. It is interrupted by this process of substitution of billing.

Q. You mean to say if we put these through routes and rates in that would end substitution in your plant?

A. No, it would not, it would minimize it.

Q. It would cut it down some? Do you think by the mere processes of substitution that creates wasteful transportation?

A. Well, it may not be wasteful to the carrier but it is wasteful to our company; it imposes limitations upon us that creates expense.

Q. Do you think the carrier should take out the privilege
[fol. 173] of substituting wheat transit?

A. No, that has been a legal process that has been accepted and recognized throughout the transit of grain and grain products throughout the United States.

Q. You feel it should still be continued?

A. Right.

Q. When you said wasteful you had in mind this substitution of transit?

A. Our own cost, our own internal cost of handling and working that out.

Q. Is that the handicap you are also talking about is the necessity substitution?

A. I am talking about the over-all limitation it imposes upon us.

Q. What is it, that is imposed?

A. It is, the limitation is limiting factors such as we buy a car of spring wheat at Havre, we want to make whole-wheat flour out of it and we want to sell it in Los Angeles. How do we get it down there?

Q. And you do get it down there by the process of substitution?

A. Right.

Q. I noticed in your letterhead you state your company was started in 1865. Is that one or more of these mills built at this location at that time?

A. The Waitsburg plant, the original structure was [fol. 174] built in 1865. Very little of that structure is left any more, perhaps only a minor part, but it was built in 1865, and there has been a continuity of operation at that point through partnerships, et cetera, until it was incorporated in 1911.

Q. How long have you had a mill at the other two points?

A. We have had a mill in Athena since 1904, and I can't give you the exact date of the mill at Milton-Freewater because I say that was operated under a separate corporation until it was merged into the parent company, but it was started prior to 1920. Does that answer your question?

Q. You bought an existing mill in 1920?

A. It was an existing mill.

Q. As I recall, you stated that you had something in excess of 7,000 hundredweight capacity when you had the mill at Pendleton and then when that burned you brought

up the capacity of the other three mills. Can you give me an idea of how much you increased the capacity of the other three mills since 1947?

A. A simple answer of that would be your deduction of taking 5,300 and 3,000, which would give you 8,300 and the increase would be measurable as 1,300 hundredweights.

Q. You say about 1925 that you first went into the California market?

A. 1925, right.

Q. Where had the mills' production been sold up to that time, do you know?

[fol. 175] A. I answered that in saying prior to that time we were distributing family flour especially soft wheat flour, we were shipping through the Canal to the New England states, New York, Massachusetts, and so forth. We were also shipping all rail to the central and southeast.

Q. Do you have any of those markets left today?

A. Those markets have been shrinking rapidly since July 1 of '46 with the percentage increases freight rate increase.

Q. How much wheat does it take to make a hundred pounds of flour today?

A. Well, it depends upon the type of flour. The United States Department of Agriculture uses on export subsidies a bushelage figure of 2.33 and I think that could generally be assumed on hard wheat it would take a fraction more than that, but I think what we are talking about here it could be assumed at 2.33 bushels.

Q. Maybe 60 pounds that is generally your experience?

A. We are accepting that.

Q. And you would be willing to accept that for the purpose of this case?

A. We wouldn't accept it on our hard wheats because there isn't as much in dispersement of the hard wheat as there is in the soft wheat. I think for this case we wouldn't want to accept anything less than 2.35 because we are speaking of hard wheats into California and for the record I think that should be specified.

[fol. 176] Q. Now, you changed the factor. I thought your first figure was two point something?

A. 2.33 to 2.35.

Q. I thought you said 1., 2.35 on the hard spring wheats and 2.33 on your normal soft wheat?

A. Yes.

Q. Where do you dispose of your mill feeds?

A. We concentrate our sale of mill feed in the Portland territory, Portland area.

Q. You don't, do you put out a mixed feed of your own?

A. No, we don't put out those feeds.

Q. You sell all your mill feed?

A. Correct.

Q. And that is sold in the Portland area?

A. Insofar as the Portland area will absorb it because we are conscious always of the fact that we must find a place to deposit this Great Northern billing and we have solicited feeders and feed processers in that market and we have intentionally just because of that have purposely worked that market very, very hard and I think we on the average get less for our mill feed in total dollars than if we were in a position to offer our mill feed in Seattle, Portland, Los Angeles, San Francisco or the valleys in between.

Q. Do you know that or is this a supposition?

[fol. 177] A. I know it. From market judgment we know what we sell our feed for and we know at times we are selling feed for what we could get more than a half dollar or more than that at times. There are other times when Portland is selling for a half dollar a ton higher. There have been times we could have sold feed in Los Angeles for more money than we were selling in Portland or we could sell in the Los Angeles market for more than we were selling in Portland.

Q. You have transit that will take you into Seattle, don't you?

A. No, we have transit that we could use, but in order to protect our California movement on flour we don't use it; we save that for our flour movement.

Q. Now you mentioned, I think several times that this baker flour going into California is a blend. Is there quite a bit of that flour a blended flour?

A. A large part of that flour is blended, yes.

Q. What wheats is that blend made up of?

A. It could be part hard red spring, Montana winter. It could be hard red spring, Montana winter. It could be hard red spring, Montana winter and dark red winter growing in eastern Washington, Oregon, for the market as it exists today and as it has developed in recent months and recent years the demand is for a control in that blend of hard red blend and hard red spring and in other flours it needs to go in there straight, like wholewheat or high glutens and that type of flour.

[fol. 178]. Q. Is the amount of hard winter wheat in those blends determined in part by what the buyer is willing to pay for the flour?

A. That was true in previous years when price was the predominant factor, but today price is important, I don't want to minimize the price, but it is getting final listed into this measurement of quality and if that isn't there then even a cheap price has no interest.

Q. I don't know whether I followed you on that. Assuming a buyer is—

A. (Interrupting) Do I understand your question? May I ask it to you? You were trying to bring out whether if Montana winter was cheaper we would use more of it; if the price went up we would use less of it?

Q. Wouldn't that have been an important factor to some of your buyers in California?

A. We don't do it that way. We have blends that are defined in on certain specifications and the buyer knows there is more winter wheat in those blends.

Q. He will do that?

A. He will do that.

Q. So that the buyer when he buys, even though he is aware of this?

A. I don't say every buyer will know.

Q. You do have buyers that are very price conscious and will shift from one blend to the other depending upon [fol. 179] the relative price of the two blends?

A. Yes.

Q. Don't they represent a fairly large portion of your market in California?

A. They have represented a good portion but there competition in the finished field of bakery product is forcing that buyer to behave.

Q. So he is coming more and more to be a quality buyer?

A. He is going to have to to maintain his distribution.

Q. That is the way you feel about it?

A. It is apparent that is the trend.

Q. But at least today you still have a very large group of buyers down there that are very price conscious and will shift from one quality to the other depending upon the price?

A. Our company is not working primarily with that type of buyer.

Q. You are working more with the quality buyer?

A. With the selective quality buyer.

Q. You say you have some wheat in there that is a hard white wheat, isn't it?

A. Spring wheat.

Q. Where is that wheat produced?

A. What we term the Big Ben Country that is in central Washington. I could name you all the counties but it is the Big Ben Country of eastern Washington.

Q. It is a Washington-grown wheat?

[fol. 180] A. Right.

Q. You have through rates on that to California?

A. Right.

Q. Now, then your other wheat that is in there, is your hard winter wheat some of that is available in Washington and some of it is west of you?

A. It represents a backhaul.

Q. As I understand it, some of your wheat, some of your flour will be made up of part, the Montana spring, the Montana winter, others might be made up of part Montana spring and Washington winter, is that right?

A. We have various brands that have been sold on the market for what they are and they are representative of those various wheats and the specifications are set up on them.

Q. Have you any idea what percentage of your sales in California represent a blend of one of these kinds of flours as compared to the straight Montana spring flour?

A. I will answer that question this way, that the bulk of our production going into California is made up of 50 per cent or more of hard red spring of this quality measure-

ment that I have been speaking of, this strong glutenness body wheat, 50 per cent or more in the blend, and the majority, by far the greatest part of the flour we are shipping into California is that type of flour. We are not going after this cheaper trade.

Q. So there wouldn't be any misunderstanding on this, [fol. 181] can you give me the percentage of the total pounds of flour you sell to California? Can you tell me what per cent of that would be represented by the Montana spring flour?

A. Well, let me answer the question this way: Of the 100 per cent of flour we ship to California, this varies sometimes in the market place, you can't tie me down to an exact figure, but it will be a very closely estimated figure.

Q. That is what I want.

A. No less than 80 per cent of the flour we are shipping into California. Let me qualify that. No less than 80 per cent of the hard wheat flour that we are shipping into California carries 50 per cent or more could carry 70, 80, 90 or 100 per cent, could carry 50 per cent or more of strong, selected high qualitative hard red spring wheat.

Q. You can't answer my question, as to what the percentage of your total sales is represented by your Montana spring?

A. Well, then you—no, because I would have to break down every brand and the estimate of every brand, but here is what I am saying. We have in the California market a hard wheat market and we also ship specialty high rate on cake flour and cooking flour in there. I am breaking this out of this case—

Q. Yes?

A. (Continuing) —I am saying a hundred per cent, I am talking only about hard wheat, I am talking about only hard wheat, taking that as a hundred per cent, and I am saying [fol. 182] that eighty per cent or more of that hundred, contains a blend of fifty per cent or more of selected hard red spring.

Q. What would you say?

A. That is a good accurate answer.

Q. I appreciate that unless you made that calculation you probably aren't prepared to do it and I don't mean to leave

any inference in the record that you are trying to withhold anything, but I was hoping you might be able to give me an estimate of what percentage of your total California sales are represented by flours milled from this Montana spring.

A. What figure do you want and what figure would be important to the case?

Q. Well, I would just like to see the relative importance of this Montana spring wheat flour milling to your total California operation.

Exam. Boisseree: What do you want? You don't want it in percentages?

Mr. Tjossem: Yes, I would like to have it in percentages. In other words, he sells—pounds of flour in California, I am simply asking him if he can give me an estimate, a percentage of that quantity is represented by flour milled from the Montana spring wheat.

Exam. Boisseree: Didn't he just give that answer?

Mr. Tjossem: No, he hasn't.

The Witness: I have given you our hard wheat flour as a [fol. 183] hundred per cent.

Mr. Tjossem: Off the record.

Exam. Boisseree: Off the record.

(Discussion off the record.)

Exam. Boisseree: Back on the record.

You had everything you wanted except the percentage of the hard and soft.

By Mr. Tjossem:

Q. Looking at Exhibit No. 15 the weight of flour that you say you sold in California for the crop year 1955 and '56, what part of that weight percentagewise was represented by hard wheat flour?

A. As nearly as I can answer that would be no less than 90 per cent of it would be hard wheat. We ship very little compared to the total, that is a very minor part of our total, so it would be accurate to say that no less than 90 per cent. For instance, if we shipped a million eighteen thousand

hundredweights down there, you could safely say that we shipped 925,000 hundredweights of hard wheat flour.

Q. And you tell me 925,000 hard wheat flour. How much of that was milled out of Montana spring?

A. I have told you that of this total hard wheat flour 80 per cent of it had 50 per cent or more hard spring in it.

Q. And that is as close as you would care to try to guess?

A. That is a very close to appraisal because month to month and year to year you lose one customer and you pick [fol. 184] up a new one, and one figure would be accurate today would be inaccurate tomorrow.

Q. Is that hard wheat bakers flours you are sending down there is that a patent flour or a straight grade?

A. Both.

Q. Have you any idea how that breaks as between the two categories?

A. The preponderance is to a patent flour; we ship both down there.

Q. In other words, your hard wheat you sell principally in California?

A. Yes.

Q. So the total flour produced from these hard wheats are moving into California?

A. Yes.

Q. I take it from your testimony the only storage that you have for grain is the storage that you have right at your mill, other than this arrangement you had at Spokane last year, is that right?

A. And it is general practice for us to make stora~~ available under lease in Montana.

Q. And what points do you have leased space in Montana?

A. That varies as to where it is available. I want to clarify the record there that that is trade practice with us, but for the record while we may control space that we have [fol. 185] under lease in Montana, we could accomplish the same fact by making a contract with a grain seller to deliver us a quantity of grain for future delivery, so for this case I think we had best revert to the storage that we own serving at our mills at our mill location because other than that you would get in the field of how you could

hold wheat on the outside and there are various avenues open to that to all mills.

Q. Your competitors, for example, maintain country warehouses in Montana, don't they?

A. Some do; some don't.

Q. The Central Flour Mill is a competitor of yours?

A. Right.

Q. Do they have warehouses in Montana?

A. I am told they do.

Q. How about the Fisher Flour Mills?

A. I am told they operate warehouses in Montana.

Q. They represent the principal competition of the mills that you have in the Pacific Northwest, don't they, or at least two of the larger ones?

A. Two of the larger ones. You certainly must include General Mills at Tacoma and Spokane, you must include Terminal Flour Mills at Portland and Spokane Flour Mills at Spokane.

Q. And General Mills has warehouses and elevators in Montana, does it not?

A. As well as a mill.

[fol. 186] Q. What competitors don't have warehouses in Montana?

A. You are asking me to answer a question there that is not within the sphere of my own company to answer. I don't know what these other people own in Montana. They might or might not, sir, I couldn't make a statement on the record.

Q. You volunteered that statement so I just wanted to—.

A. (Interrupting) I want to qualify it that I am not qualified to speak as an officer of my company for what some other company owns or does not own.

Q. In other words, you don't know of any?

A. I might know but I am not qualified to answer that question.

Q. You made the statement that there were some of your competitors did and some of your competitors didn't have storage.

A. I was only doing that insofar as I was emphasizing that we did not and I am qualified to make that statement.

Q. I see. Have you any idea of what per cent of capacity you operated your mills in the crop year 1955-'56?

A. Yes, we operated at a normal five-day twenty-four capacity.

Q. And you consider that a hundred per cent capacity?

A. Generally speaking, as these exhibits have been determined, I think they are based upon a 300-working day and I would say that we operated no less than 90 per cent of that capacity.

Q. On a 300-operating day?

A. Yes.

Q. Actually do you operate six days a week or five days a week?

[fol. 187] A. We try to operate five days a week because that is our most economical operation in view of the penalties for overtime, but that is influenced by customers' needs, shipments that have to be made and et cetera. There are conditions that we may, we might run Saturday and Sunday and be down the next Thursday and Friday.

Q. The reason I ask that question I wrote Mr. Theda, I think I know who he is, of the Pacific Millers Association and asked him if he could furnish us with a statement of what percentage the mills in Washington and Oregon operated and I know he submitted that on a 255-day basis.

A. Two hundred fifty-five days?

Q. Two hundred fifty-five days, which he states is on a five-day per week operation.

A. He may have a different method of measurement, but I was using this 300-day, 300-working days because it appears in Exhibit 12. That seems to be the Pacific Millers Association as well. But that is a day operating figure so I wouldn't question the source of that because the figures there were just daily capacities, you see, and whoever combined this exhibit has used 300 working days and I think that is generally conceded as—

Q. I mean on a five-day week twenty-four hours a day, I take it you use that as your basis that your mills operated at a hundred per cent capacity?

[fol. 188] A. The hundred per cent capacity is not an accurate statement to measure this by. We could have produced more flour than we produced. If you say a hundred per cent of capacity but if you—we operated five days a week twenty-four hours a day during the last year.

Q. All three mills?

A. All three mills. That is a more accurate answer to your question.

Q. Are you familiar with the milling statistics that are supplied by this Pacific Millers Association?

A. We are a member of the association and those statistics are available. I don't know which ones you are referring to.

Q. I asked Mr. Theda to furnish these to me and to appear as a witness. He was reluctant to appear as a witness and I would just like to ask you if you will look at those figures that he furnished and tell me if you are familiar enough with them to state whether you believe them to be accurate.

A. Mr. Theda has reported to him by the individual member production figures and our company is a member of that association and we accept his figures and I would have reason to believe that they would be of authority in this case.

Exam. Boisseree: Off the record.

(Discussion off the record.)

Exam. Boisseree: Back on the record.

In view of the questions and answers, your questions and [fol. 189] the answers by the witness with reference to this document, as you have tendered, I think that we can delay having it marked for identification until you can procure sufficient reproductions to serve all the parties.

Mr. Tjossem: That is correct.

Exam. Boisseree: You will do that during the noon hour and you will tender your exhibit later on during the hearing?

Mr. Tjossem: That is correct.

Exam. Boisseree: Thank you.

Off the record.

(Discussion off the record.)

Exam. Boisseree: On the record.

By Mr. Tjossem:

Q. Well, apparently, Mr. Welk, from this Exhibit 4 and Exhibits 3 and 2, the farmer in Montana is not yet aware of this qualitative characteristic of his wheat, is he?

A. I think he is in a measure.

Q. How do you explain why he is increasing his hard red winter wheat which I understand you to say is a poorer quality than the hard spring variety?

A. In Mr. Mikkelsen's testimony yesterday he discussed in detail the farmer's grain economy and the benefits derived from the seeding of winter wheat as compared to the seeding of spring wheat, and I would like to refer you to his testimony on the income farm that, and in sum and substance it is this, that first, the ground must develop [fol. 190] a wheat that is winter harder so his chances of winter kill is not what they were 15 or 20 years ago. Number two, the machinery and the method of cultivation are such, including the application of fertilizers in the vast field of improved farming operation are such that by the introduction of winter wheat into his soil in the fall of the year he has the opportunity of conserving a greater amount of moisture to service that plant and in sum and substance he develops more muscles not acre if he gets his winter crop through.

And I again express the fact he has got a variety that doesn't winter kill he can seed it to the farther degree northward and he is going clear up to the Canadian line with it. He gets more dollars by seeding winter wheat.

Q. Even though it is inferior quality?

A. Even though it is inferior quality because the government makes the price for the wheat to start with, gives him a minimum support price.

Q. That minimum support price is the same irrespective of the quality of the wheat?

A. Other than some protein premiums on the wheat at certain levels but they're small.

Q. That protein reminded me of a question. What protein do you mill in your hard wheat flours going into California?

A. We have a range of protein from eleven to seven-
[fol. 191] teen and a half.

Q. As high as seventeen and a half?

A. Some of our clears are up there high.

Q. I see. Of your patent and straight grade of flour going down there what would you say?

A. Eleven to fifteen.

Q. What is a fair average?

A. That varies some and I couldn't give you an accurate average because we would have to again take our total volume of each brand and break it down and we haven't done that for this case because it varies from day to day and from month to month.

Q. What protein wheat does it take to make the protein of 12 in the flour?

A. It would be dependent somewhat upon the percentage of patent you would cut, if you cut an 80 per cent patent you would have to, you say a 12 minimum?

Q. Yes.

A. And on a cut of 80 per cent patent on a dry basis you would be buying your wheat at fourteen and a quarter per cent.

Q. Is that—I use 12 per cent as the difference between the wheat and the flour on that same basis the same if the protein would go up or down, is that difference that you gave us about the same irrespective of the protein of the flour?

A. No, test weight would have a bearing upon that. That
[fol. 192] is why we have premium discount for test weight kernels would have a bearing upon that. You have other responsive characters that would vary that, that is why we have to mark various adjustments for those factors, but those are all under rigid specifications and I am giving you a practical figure there, though at fourteen and a quarter make it twelve protein eighty per cent patent spring wheat flour.

Q. On a general basis assuming you have got to assume 60 pound wheat, I suppose and relative moisture content, you figure something, the four would be something around two?

A. You would have to to (sic) a two and a quarter per cent loss.

Q. On your milling?

A. That ould vary from one unit to another. I am trying to give you something here that would be indicative of a general practice figure.

Q. Yes.

Cross examination.

By Mr. Garing:

Q. With respect to some testimony that you gave concerning the government allotment of acreage in Montana, if I might clear up in my own mind what the testimony was. Didn't you testify that in 1956—

A. Just a second.

Q. (Continuing) —in 1956 the government allotment of acreages was four million total acres for wheat?

A. Right.

[fol. 193] Q. Did I understand that of that total acreage there were 1.1 million acres of winter wheat?

A. Correct.

Q. And 2.7 million acres of spring wheat?

A. Total of 3.8 million harvested.

Q. And that was for the year '55-'56?

A. Right, and that is exclusive of durums. This is bread wheat; we have excluded the durum wheat, we have excluded that in these figures.

Q. By excluding it do you mean there the 3.8 million acres didn't represent the entire acreage of wheat?

A. This excludes durum acreage. You recall it was in short supply and they opened it up, opened up the acres for durum and that is not connected with our problem.

Q. Now with respect to your Exhibit 4 if you would turn to that under your listing 1955, would 1955 be for the crop year 1954 to 1955?

A. I stand to be corrected by Mr. Mikkelsen who testified on this exhibit, but my understanding is that this would be the wheat harvested during the harvest of '50, '51, '52, '54;

Mr. Mikkelsen: Should I answer on that?

Mr. Garing: I will accept that.

Mr. Mikkelsen: Mr. Welk, the 1950 means the wheat harvested at the end of the summer of 1950 and so on.

The Witness: That is correct.

[fol. 194] By Mr. Garing:

Q. So that the figures you have just given me with respect to the 1955-'56 crop year as to the total acres allotted to the government relates to the—

A. Harvest just completed.

Q. Which is a different year than the year 1955 shown on Exhibit 4?

A. Right.

Q. I take it, then, Mr. Welk, that represents a considerable shift in the harvesting of spring wheat over winter wheat than has been shown on your Exhibit 4 from 1950 to 1955?

A. That is accurate, and was brought about by a very sharp, severe winter and heavy winter kill and as a result there it had to be reseeded, the acres shown as seeded as spring wheat however have resulted in mixtures because that ground had previously been seeded to winter wheat and killed out.

Q. Well, what is shown to be—

A. (Interrupting) In many instances.

Q. What appears on Exhibit No. 4 to be a trend from 1950 through 1955 of the decline in the production and percentage of acreage of production, percentage of production, in central and north central Montana of spring wheat wasn't borne out in 1956, was it?

A. No, that trend is accurate and displays exactly what happened from '50 through '55, and will again happen subject to very, very drastic winter kills such as we had in [fol. 195] the winter and fall of '55 and spring of '56 and winter of '56. I made the statement that this trend is shown from '50 through '55 is accurate and will continue because when you have winter kill such as you had in '56 it reduces the income of the grower and he will turn right around in the fall of that year and go back to winter wheat

and take his chances because of the opportunity for greater income through the channel of harvesting winter wheat.

Q. That is what you believe he would do?

A. Yes, and the past has proven that, exhibit 4 has proven that.

Mr. Tjossem: I overlooked a subject that I asked Mr. Mikkelsen about yesterday. I was told to wait for this witness.

Exam. Boisseree: Go ahead.

Further cross examination.

By Mr. Tjossem:

Q. Would you look at your Exhibit 15, Mr. Welk, for the crop year 1955-'56, which indicates your California business was approximately 66 per cent of your total production. Where did you market your other 34 per cent?

A. In the domestic and export market outside of California.

Q. That would be principally delivery through the Portland area?

A. It varies. Yes, we sold, I think it quite evident we sold quartermaster shipment because of another exhibit showing the mill feed and flour to the Portland area. To answer [fol. 196] your question specifically it was sold in the domestic and export market outside of California.

Q. That would be in the areas north of California?

A. North and we shipped eastbound to the central states. We are still shipping into New York.

Q. I see. Is the other 34 per cent of your business in this crop year is that mostly hard wheat, too?

A. No, that varied because that portion of our business shifts greater than the California business. It is not as thoroughly established. Price is a factor as it is in California, but much more so. We are in markets where mills other than the mills of the Northwest operate. It is like your quartermaster corps subject to sealed bid and state business subject to sealed bids and ramifications of any market that is open to us at the time.

Q. You do, then, mill a full line of flour including cake and pastry?

A. Right.

Q. You still make some family flours, do you?

A. Very, very limited degree.

Q. And do you put out the small package goods, too, do you?

A. We do for the stores in Walla Walla but we are not in the package prepared mixes or anything of that type, no.

Q. Does all of the flour other than what you deliver in Walla Walla that you ship out of there, does that go out by rail or do you truck some of it out?

[fol. 197] A. We truck some.

Q. And how far do you truck that, how far away from the plant do you truck that?

A. Three hundred miles.

Q. Do you use common carrier truck or do you have your own equipment?

A. We do not have our own equipment for the conveyance of that; it is generally common carrier or in some instances the bakery owns the equipment.

Q. And they come to the mill and pick it up?

A. Yes.

Q. I see. Now, does some of your grain, is that delivered to the mill by truck?

A. Testimony yesterday indicated that we were accepting grain by truck.

Q. I notice, for example, in Exhibit 16, I believe it is, I beg your pardon, Exhibit 18, you show there under Item 3 that you applied Great Northern transit to the movement of wheat to the Pacific Coast ports. Would that represent truck delivered grain?

A. It could.

Q. I think you mentioned that you were right in the heart of a wheat-growing region, that is one of the big wheat producing areas of Oregon and Washington, isn't it, where your mills are located?

[fol. 198] A. That is right, the foothill territory of the Blue Mountains is a large producer of soft wheat wheat (sic).

Q. While it isn't the kind of wheat that you apparently desire for your manufacture of flour, there is a very large

quantity of wheat exported out of those areas every year, isn't there?

A. Correct.

Q. And you buy some of that and export it out yourself, it looks like it under Exhibit 18.

A. That is right. We use some of that wheat that is trucked into us and store it and we will buy it eventually and we will either, if it is undesirable, we will ship it to the coast if it is wheat that will fit into our specialty cake flours or soft wheat flours or pie flours or whatever the type of flour we might be making, some of that will find its way into those grades.

Q. So you do move wheat to be trucked in and be trucked out, some of that will move that way?

A. Yes, that is right.

Q. How far away from your plant would you say that you have reached out and received grain by truck, what is the fartherest distance?

A. The grower generally doesn't like to haul over ten miles. It depends somewhat on the grades and the surface of the highway and how close he is located to that highway and where the nearest elevator is, but generally speaking [fol. 199] the grower prefers not to run over ten miles from his combine.

Will you restate your question again.

Q. Yes, I will be glad to.

What I am really trying to get at, Mr. Welk, is to get an idea of the area from which you can draw and do draw grain by truck to your mills.

A. We have under some instances of common carrier drawn grain as far as about 75 miles but that might have been a specific lot of wheat that we wanted to fill a specific need, but for general practice the only wheat we take in by truck is what comes to us by the grower himself directly from the combine.

Q. That would be in about a radius of ten miles from your mills?

A. That is right, there is a little give and take there but it gets uneconomical if he has to drive farther than that.

Q. Can you buy that wheat that is delivered by the grower any cheaper than when it is delivered by rail?

A. No, the grower, of course, looks upon his support market as the minimum prices he is going to take for the grain since there has been ample storage that is justifiably so. I would say you don't buy that wheat any cheaper than what you buy any other wheat that is moved into your plant on a transit movement.

Q. Isn't it normal over there to charge the grower a handling charge on elevator delivered wheat?

A. That is correct.

Q. Don't you make that charge to him?

[fol. 200] A. Our houses are not licensed, because, as Mr. Mikkelsen pointed out in testimony yesterday, we are primarily hard wheat millers and we offer a service to a minimum number of farmers to haul their wheat in. We do not give them a warehouse receipt; we are not a licensed house. We record a consignment to them and that is accurate.

May I just check with my assistant, I don't want to make any misstatement here:

Mr. Mikkelsen: That is correct.

By Mr. Tjossem:

Q. So that the wheat you take in from the grower that you don't buy is on a consignment basis and not on a stored basis, is that what you are saying?

A. We perform the storage for him until he gets ready to sell it.

Q. And you don't charge him any storage for that?

A. We in effect reflect some storage return to us in the price that we pay and he understands that, but that is a matter of buyer and seller negotiation at the time of sale.

Q. In other words, he recognizes that—

A. We have no legal right under the Warehouse Act to effect storage charges or to operate as a public warehouse.

Q. So anything that you would make for that service is reflected in the purchase price not as a separate charge?

A. Yes.

Mr. Tjossem: I think that is all.

[fol. 201] Exam. Boisseree: Redirect, Mr. Wettrick.

Redirect examination.

By Mr. Wettrick:

Q. I just want to make this clear, item 3 of Exhibit 18 to which reference is made, the amount there shown is—was not all truck-in wheat, was it?

A. Not necessarily, no, I didn't want to imply that.

Q. In fact, would that be only a very small part of the amount shown there, the truck-in wheat?

A. I haven't that breakdown before me, Mr. Wettrick.

Q. Does the wheat that is trucked in meet quality specifications?

A. Generally not, generally not.

Q. That is not the kind of wheat that you could use to make a flour that you shipped to California?

A. It hasn't in recent years anyway. There have been some varieties adjacent to our mills that we haven't liked for our flour production.

Mr. Wettrick: That is all.

Exam. Boisseree: I guess that is, Mr. Welk, your exhibits have been received in evidence and you are excused.

(Witness excused.)

Mr. Wettrick: That concludes our case, Mr. Examiner.

Exam. Boisseree: At this time, then, we will take our noon recess until 2.

Mr. Tjossem: Yes, I would like to have 2 o'clock, if I [fol. 202] could to get this exhibit prepared.

Exam. Boisseree: We will recess until 2 p. m.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m. of the same day.)

[fol. 203] COLLOQUY BETWEEN EXAMINER AND COUNSEL RE: POSTPONEMENT OF HEARINGS

AFTERNOON SESSION

2:00 p. m.

Exam. Boisseree: We will come to order and resume with the hearing.

Mr. Tjossem, are you ready to proceed now?

Mr. Tjossem: As indicated in the off-the-record discussion yesterday, the Great Northern will not be prepared to complete its case at this hearing. I would like to say in connection with that, under date of August 31, 1956, I wrote to Frank Mullen, Chief Examiner, and stated that because of the necessity of making extensive traffic studies that it would not be possible for the Great Northern to complete its preparation of the defense of this case for submission at the hearing set in Seattle on October 3rd, 1956. Mr. Mullen replied to me under date of September 17th, and stated that a request for continued hearing for the submission of defendant's evidence should be presented at the hearing to the presiding hearing examiner; he has authority to rule upon such a request and to grant a continuance if he believes it to be justified. That was the state of the record as we came into this hearing yesterday on October 3rd.

Now this case involves a prayer that the Commission require the Great Northern to establish a new route that will shorthaul the Great Northern on our Montana grain to California. The relief here sought, if granted, would disturb routing and rates of long standing and our evidence will show that wheat, the commodity here considered, [fol. 204] is the most important single commodity so far as revenue is concerned on the Great Northern Railway Company. Last year our revenue on wheat alone was in excess of $30,000,000, and this revenue exceeded the revenue from any other commodity including iron ore. We consider this case to be one of the most serious cases because of the revenue aspect that we have encountered in recent years. We know that a large part of this wheat revenue that we have is produced by wheat originated in Montana; we can-

not determine with any degree of accuracy how much of this revenue is from Montana wheat or from Montana wheat carried to California without making a detailed study of our traffic. Because of the transit operations on these grain movements it is not possible to determine this California movement for which the new route is sought from the records of the origin stations. This grain in the first instance is billed to a transit station and therefore requires that we examine the weighbills beyond the transit stations in order to determine the ultimate destination rates and revenues derived from these grain movements. This study of these subsequent movements requires the study of individual carload reports from our connecting carriers, because the Great Northern, insofar as the California traffic is concerned, will not terminate this grain or flour except in very minor instances.

I assume the parties are aware of the fact that where grain is transited it moves out of the original station to the transit station on an inbound rate and revenue is col- [fol. 205] lected on that basis. If the grain is transited it then moves on a through rate and moves to connections such as we have here to California, that it is necessary to revise the freight bills to show in many instances the new through rate and then it becomes necessary to revise the revenues collected by reason of the change in divisions between any connecting carriers prior to such movement, and because of a new connecting carrier in the movement where the transit movement had been entirely on the Great Northern. This work of examining these connecting carrier reports is one of having to look at each car and to draw from the thousands of cars that have moved the detail of these revisions and the ultimate revenues that have resulted.

We know there are many cars involved on this Montana movement and we have just not had time or the ability to make these traffic studies which we believe to be essential in order for us to adequately prepare our case.

We therefore must state that the Commission should not decide this case until we have had an opportunity to show the importance of this case to the Great Northern and the impact of any adverse decision on the Great Northern, and

such a showing requires the development of this fundamental traffic study which I have described.

As I have mentioned, when this case was first set for October 3rd, 1956, it was assigned to me. I knew I could not give it adequate attention and I wrote the Commis- [fol. 206] sioner on the date of August 16 asking for a sixty-day postponement. This request was denied from the Commission on August 22. Shortly after this I was advised of the fact that we could not prepare our traffic studies in time for the October 3rd hearing, and as I mentioned, I wrote the Commission on the date of August 31, stating we could not have our case prepared for hearing at that time and would have to ask for a continued hearing, at which time we could complete our case.

It might appear that with a large organization such as we have on the Great Northern we should have been able to make these studies in the time allowed between the setting of the hearing and the hearing date, but this isn't the fact. Because of studies being prepared by the accounting department for the division cases 31503 and 31627, the Southern Grain case 31874, and the Union Pacific application to acquire the Spokane International, File Docket 19315, our accounting people state it will be at least five months before they can complete this traffic study required for this case. They state that in order to break out of our grain traffic this Montana-California traffic for a period of three representative months will take them at least two months' work on an overtime basis, and even though they have been and are working on an overtime basis, they are running three months behind on the studies as they are required for these Commission proceedings. It, therefore, has been and is physically impossible for the Great North- [fol. 207] ern Railway Company to be prepared at this hearing date with all of its case, and we therefore must request a continued hearing at which time and place we may complete our defense. And I again wish to say that under the circumstances that I have outlined to require us to submit our case at this hearing before it has been physically possible for us to develop the basic information required to complete our defense will deny us an opportunity for a fair hearing or an opportunity to adequately defend ourselves.

Now with respect to what might be done, we are agreeable to any program which would permit us to complete our defense after we have had an adequate time for preparation, excluding agreeing that the present examiner need not preside at the adjourned hearing. And we will be agreeable to the adjourned hearing being fixed at any place that is convenient to the Commission and the complainant. We are further agreeable to the submission of our additional evidence under modified procedure rules in the form of verified statements with the same privilege to be accorded the complainant as to any rebuttal testimony that they might wish to submit, and with the right of cross-examination as provided in Rule 53 of the Rules of Practice, and if such right of cross-examination is requested that we are agreeable that it could be held before the present Examiner or such other Examiner as the Commission may assign, and at any place that will meet the convenience of the [fol. 208] Commission or the complainant.

Exam. Boisseree: Before I ask Mr. Wettrick for any comments on your motion, Mr. Tjossem, I would ask you what do you think would be the earliest possible date that you would have these studies or whatever else you feel is necessary to a proper defense?

Mr. Tjossem: I called St. Paul this morning and got ahold of our accounting department and explained the situation that developed off-the-record yesterday, and they again told me it was their statement of five months was the shortest time that they would have this available.

Exam. Boisseree: Roughly March 1, 1957?

Mr. Tjossem: If that is five months, yes.

Exam. Boisseree: What do you propose—what are you in a position to present now in the way of a defense?

Mr. Tjossem: We have some maps showing the rate territories available to this mill, and we have—

Exam. Boisseree (interrupting): I didn't mean that in particular. I meant would you be—well, perhaps it isn't a fair question. What I was trying to lead up to is to an ascertainment of a proposition of part of your defense. I suppose that some of that would depend upon the outcome of your traffic studies? Is that right?

Mr. Tjossem: I think the traffic study is the most essential thing that we want. I think, Mr. Examiner, under [fol. 209] Section 15(4) U. S. Supreme Court decision, the Supreme Court has said that the Commission should weigh the effect on the carrier and the effect on the shipper under Section 15(4) and we think this traffic study is essential in order for the Commission to realize the impact of this new route on the Great Northern. And undoubtedly when we make that traffic study we will wish to put in some rate studies to accompany it, and I know another thing we are preparing and will want to put in is a statement showing the original territory and distribution territory available to the complainant mill—I mean, competitors of the complainant mill on this same wheat.

Exam. Boisseree: Of course, if those should disclose that the impact on the Great Northern should be somewhat less than you would anticipate—what I am leading up to is that even after you obtain those traffic studies there may be some additional time required to complete your defense.

Mr. Tjossem: I am sure we will do everything we can. Our limiting factor here is our accounting department. I am sure that if we set March 1st as the target date, in some manner they could get that out in time for us to get our submission on that date.

Exam. Boisseree: Mr. Wettrick, may I have your position on the record with respect to the motion, and I assume there is going to be some defense put in this afternoon. Is that correct?

Mr. Tjossem: Yes, we will put in as much as we can.

[fol. 210] Mr. Wettrick: I hardly know what to say about this situation. What concerns me most is the fact that the Great Northern thinks it will take five months to get some data or statistics for a relatively simple, well-defined case like this is, in which the thing complained of stands out like a sore thumb, not only so far as the situation generally is concerned but in the light of other cases which the Commission has decided and in which the Great Northern was the principal defendant as it is in connection with this case with none of the other carriers even putting in an appearance. And it's gotten to the place now where it raises the question as to how far the Great Northern is

going in denying the few remaining shippers that are still at a great disadvantage relief from the situation in the face of repeated decisions of the Commission. If it were not for the fact that counsel says they have got to make a weighbill investigation and other things, tracing all these shipments through, and that it will take five months to do that, we might think that a matter of thirty days or so would be sufficient to prepare for any ordinary case, but in the face of that and with the threat made off-the-record yesterday that unless it is granted the Great Northern is going into court with this thing—

Mr. Tjossem (interrupting): Mr. Wettrick, I don't like to stop you, but I didn't make that statement. I want to register an objection to that right now.

[fol. 211] Exam. Boisseree: He made the statement yesterday? At least not in my presence he didn't make such a statement. He did make the statement the Great Northern would be of the view that they had been denied a fair and full and complete hearing and a statement which he reiterated on the record just a few minutes ago.

Mr. Wettrick: I got that impression, and I thought it was directly made. That is neither here nor there anyhow. If I am wrong about that, I will waive what I said in that connection.

Now we had hoped, of course, as I said in one of my letters in response to Mr. Tjossem's request for a postponement, that this case might take its usual and regular course, and that if complainant was to have relief that it might be available by the time the crop season of 1957 arrives because, as I think the evidence so far shows, the situation is becoming more difficult and intense and there is a question as to how long a shipper can carry on under the circumstances which exist. So we thought if we were going to have relief from that situation that we would like it as soon as possible or in the ordinary course of business.

I might well question the materiality of all this testimony that counsel says they want to prepare and introduce in this case. It's very much like testimony offered by the Great Northern—evidence offered by the Great [fol. 212] Northern in the Helix case and referred to at considerable length in the opinion of the Commission only

to say in the end that that isn't determinative of the case; that the mill that was complaining there was entitled to reasonable joint rates like other mills had notwithstanding these considerations. But I don't know, I am not sufficiently familiar even with what counsel has said as to what testimony or evidence they propose to prepare so that I would want to stand upon the contention that it isn't material and therefore should be brushed aside by the Commission, and that they should be denied a postponement to prepare immaterial testimony.

And so in view of all these things, Mr. Examiner, I don't know anything better that I can do than to say that we will have to leave the question of a postponement to the Commission, and I don't want the Great Northern to have to go through this case without preparing it. They have had the complaint several months; they knew that it was coming up and in my opinion should have been ready to try this case, but if they are not and they need additional time, I am not so unreasonable that I would deny that to them and insist upon them going to trial without adequate time to prepare for the case. We would very much like to avoid a postponement, but under the circumstances I presume we will have to leave it to the Commission.

Now I want to make this further statement, that it is never satisfactory to begin a case like this, particularly a [fol. 213] sort of a rate and traffic case involving many details, it is never satisfactory to start the case before one examiner, to be perfectly plain, and finish it before another one if there is anything to the idea of the opinion that you form of witnesses and the atmosphere that prevails at the hearing that is lost, if after a case has been partially presented, there is a postponement and it gets before another examiner. Therefore if there is to be a postponement, and particularly a postponement of any considerable length such as counsel refers to, then it probably doesn't become so important whether the hearing is held in five months or in six months, and I would be inclined for the reasons that I have just mentioned to let the determining consideration then be the question as to whether the examiner who started this hearing is ready to proceed. So I would rather strongly urge, or definitely

take the position, that whatever postponement is granted it should be with the understanding that sometime at the convenience of the Commission and the examiner who started the hearing it be carried on through. I feel rather strongly about that.

Now with regard to suggestions that have been made that we might revert to the short end or modified procedure and finish the matter up in that way, I wouldn't be adverse to that, but it still wouldn't solve what we had in mind when I said we would like to have this case go through the regular course. We would avoid the necessity of having another hearing, probably might save some time [fol. 214] because it wouldn't be necessary to convene the parties, and for the present examiner to accommodate himself to the hearing, and if the Great Northern would furnish us with the exhibits and the statements perhaps we could file counter-statements and handle it in that way.

Before agreeing to that, or deciding about that, I would want a copy of the statement Mr. Tjossem has made because he went right along and I didn't get all the implications of what he proposes to prepare. But in order to save time, not only time required to convene again and of a further hearing, but perhaps time in disposing of the case, we would be inclined to look favorably upon that though I wouldn't want to agree to it now.

Exam. Boisseree: Well, in view of your comments, Mr. Wettrick, maybe mine right now might be appropriate. Of course, when I indicated off-the-record that it might be because of other circumstances, might be difficult for me to preside at an adjourned hearing, I meant at any particular time. If we were to finish up this proceeding under the so-called modified procedure, I think that it would be agreeable, and then, of course, that would make me always available. I would, and my orders are to that effect, but once a case is assigned to me it will be mine until it is taken away, and in view of the fact that if there would be submission of this material under a modified form of procedure, it still would be my proceeding. It is still mine [fol. 215] until I have served a report.

Mr. Wettrick: We had simply been adding to the record that has been made.

Exam. Boisseree: You wouldn't get another examiner unless something should happen, some unforeseen thing like my death or disappearance or something like that, but there is a thing in my mind now, in view of your comments which I construe to be conciliatory to working out something in order to help the Great Northern to have an opportunity or to preclude any other course of action that you might not wish, whatever the purpose or objective, I don't believe that you are vigorously opposed to it if it is necessary. That is my understanding of the tenor of your remarks, so in that event I would make this suggestion to the parties: That perhaps we can tentatively agree to handle it that way with the very strong suggestion from the Examiner to the Great Northern that they do everything to expedite it, and of the additional fact that maybe in order to reach some decision on this thing at an early date that the parties would agree to waive the service of a proposed report which would again eliminate some additional time. Of course, I have no idea what the decision of the Commission would be any more than you. You would also have a right of reconsideration because in normal events it would go to a division of the Commission rather than the entire Commission. That is another thing that might be considered in order to expedite a decision [fol. 216] and still the parties have full and complete opportunity for presenting this evidence.

Now originally when we had discussed this matter off-the-record, it had been my intention to make some affirmative, some definite action on the motion, but I don't believe that is now necessary in view of your remarks, and that we can present this matter, if need be, to the Commission. But my own thought would be that we go ahead now and make provisions for submitting this material and giving you an opportunity for reply and in that manner do everything that we can to expedite an early decision. It is possible that it could be maybe before the end of the 1956-'57 crop year, I don't know. There are many, many factors that come into play in something like that.

Is that agreeable to you, Mr. Wettrick, or not?

Mr. Wettrick: Well, I think you have summarized or diagnosed, if I may say so, my idea about it fairly well.

Exam. Boisseree: I know that you are reluctant to—

Mr. Wettrick (interrupting): I didn't intend to immediately commit myself to the idea of carrying it out in that manner. I would like to think that over a little while.

Exam. Boisseree: That is what I was leading up to. My thought would be, of course, that we do something at an early date to ascertain this. Now if the parties wish the motion for an adjourned hearing to be considered, I can take it back with me to the Commission and submit it to [fol. 217] the Commission direct which will eliminate any action by the examiner. In that event the Commission would come up with some type of an order directed to the parties in this proceeding, if they should grant it, providing setting out dates and reply dates, and making some findings on the basis of that motion and your reply, of course. That would mean it would be some little time because we would have to have the transcript before I could submit it to the Commission. I couldn't rely on my memory. I would have to have your statements as transcribed by the reporter and then we would have an order-up which, assuming for the purposes of argument here, that the motion would be granted, we say that the Commission may direct the Great Northern to, by such and such a date, to complete their presentation of their modified procedure and with twenty or thirty days to the complainant to rebut that, if they so desire, upon which such and such a date the case would be considered submitted, briefs would be due on such and such a date and a proposed report would be served by an examiner, or it would not be, depending upon what the Commission would find in that order. It would be in the form of a memorandum order which would give some basis for the ultimate order in paragraphs.

Now that might be a procedure to suggest to both of you then if you do not like it you can immediately ask, it probably would come out signed by either a single Commissioner or by a division and you could take exception [fol. 218] to it if you didn't like it. You could go forward, Mr. Wettrick, if you felt that it was wrong and ask the entire Commission to review it and order the case to be submitted on the record as it now stands after you have had this time for reflection and to review the record your-

self. On the other hand, Mr. Tjossem might, if he didn't think the thing was satisfactory to him, appeal to the entire Commission and ask the Commission to reverse whoever signed the order. I would set up that procedure if the parties would agree, all with the idea in mind of expediting a decision in this case. That is just a plan we are suggesting which would eliminate your making any decision now and Mr. Tjossem making any decision other than making his motion. In other words, we consider the hearing temporarily adjourned subject to the Commission adjourning it, subject to an order permitting the Great Northern to submit whatever information they want in answer to the complaint on such and such a date, and a reply by you, Mr. Wettrick, on such and such a date.

Mr. Wettrick: My idea there was, I don't think the Commission would look with favor upon postponing a case for five months upon the mere statement that it's going to take that long to get this data together in connection with this case and, notwithstanding the conciliatory attitude that I have tried to adopt here; the Commission generally exercises a firm stand or position in connection with matters of this kind. I think the situation calls for some authoritative order or direction to the Great Northern [fol. 219] that this idea of taking five months to prepare for a case like this cannot be accepted and that they have got to do it in a shorter time.

Exam. Boisseree: Well, I don't know that we have a motion that is now pending before me and through me to the Commission requesting a definite adjournment of this hearing until March 1, 1957, at which time they will submit their remainder of their defense and to which you have indicated that you are not, you are certainly not in favor of that motion, but that you are not opposed to giving a reasonable time to the Great Northern to complete their presentation provided, of course, subject to conditions that you stated in the record, one of which you would prefer the same examiner who started it and it would be handled by a modified procedure which would omit calling for another formal hearing.

Now I think if the parties will agree, we have given two courses of action, you can leave it that way, I will

submit it to the Commission upon the record as made here when I receive the transcript from the reporter, or we can provide that the hearing will be temporarily adjourned and that within twenty or thirty days, whatever the parties wish, statements in support of their motion or opposed to the motion or clarification of position which would give you both time to reflect and examine the statement, can be filed by counsel and then it will not be submitted to the Commission until after those are received. I am agreeable [fol. 220] to anything but I think we ought to make some decision here on how to get this to the Commission.

I can make a ruling right here which would mean probably nothing. Whoever the ruling would be adverse to would immediately take it to the Commission which would require twenty or thirty days to reply, and I think we would ultimately end up with more loss of time if the Commission should decide in favor of the motion.

Mr. Wettrick: Before we decide on a course of action, could I have just a few minutes to discuss the matter with my clients?

Exam. Boisseree: We will take a ten or fifteen minute recess now.

(Short recess.)

Exam. Boisseree: On the record.

Mr. Wettrick: Mr. Examiner, I have consulted with my clients in connection, in regard to this matter, and as a result thereof I would like to suggest this course of action: That the Examiner, when he returns to Washington and finds an opportunity to do so, consider this question as to the length of time the postponement shall be with the Commission or such officers of the Commission as may be necessary, and determine what date should be fixed for the Great Northern, should reasonably be fixed for the Great Northern to submit the balance of its evidence in this case, and that the parties be advised accordingly. As I understand it, it isn't thought that it would be necessary to go [fol. 221] beyond March 1st on that time. We would like it if the time could be fixed somewhat earlier than that, but will abide by the conclusion reached as the result of

the consideration to be given to it in Washington with the Commission.

Exam. Boisseree: I am going to make just this comment, Mr. Wettrick. In order to eliminate a misunderstanding in view of the fact that we could delay that I would suggest that it come from the Commission rather than from the Examiner in order to eliminate that one step, because under our rules as you know, there would be time for exceptions and replies to any determination by the Examiner.

Mr. Wettrick: That would be final so far as we are concerned and I assume so far as the defendant is concerned, and as I understood it, it would be considered on the basis of the statements made on the record here.

Now with regard to adopting the modified or short end procedure we would like to avoid a further hearing if necessary and while I would like to give it a little more consideration, our present inclination is to agree to submitting the case in that manner.

Exam. Boisseree: I would make this further statement as a precaution for you, and it is customary in proceedings that start on the modified procedure if it becomes necessary for counsel of either side to feel that they need the opportunity of cross-examination, that they can petition [fol. 222] for a hearing to that extent, and I think we could make that, that is a part of our modified procedure rules.

Mr. Wettrick: After being reminded of that, and with that reservation anyhow, I think we could adopt the plan of carrying it on through that way and that that would be agreeable to us.

Exam. Boisseree: Mr. Tjossem, do you have—

Mr. Tjossem (interrupting): I included that in my motion that it is agreeable to us.

Exam. Boisseree: The next thing, and I take it from both of your remarks that you are content to rest on the statements that you have made of record and you do not desire an opportunity to file anything supplemental on this after we leave here, the next thing to happen will be either a report hearing note or order, whatever the Commission chooses, which will set up the program from here

on and provide for any action that—of course every action of the Commission is subject to exception and petitions for review, but I don't know if that will be necessary.

Mr. Wettrick: Very likely in view of the extent which we have gotten together now on this thing and as we presently understand it it would simply be a note from the Commission as to when the additional evidence shall be provided.

Exam. Boisseree: That would be the way I would pursue it, but I can't speak for the Interstate Commerce Com- [fol. 223] mission. We will go forward with your case now and thank you, gentlemen.

Mr. Tjossem: Mr. Fuller, will you come forward, please.

F. W. Fuller was sworn and testified as follows:

Direct examination.

By Mr. Tjossem:

Q. Will you state your name and address for the record?

A. F. W. Fuller, Traffic Manager, Fisher Flouring Mills Company, 3235 Sixteenth Avenue Southwest, Seattle 4, Washington.

Q. Fisher Flouring Mills Company engages in the production of flour?

A. Yes.

Q. And what is the flour capacity of that plant?

A. Fisher Flouring Mills Company has the one plant at Seattle with the daily capacity of fifteen thousand hundred ninety and one thousand tons of feed and two-and-three-quarters million bushels storage space, in connection with the mill at Seattle, plus one-and-three-quarters million bushels storage space in the country at some sixteen country elevators for a total of four-and-one-half million bushels storage space.

Q. Do you know, Mr. Fuller, why it is that the Fisher Flouring Mills maintain country storage?

A. Yes. We find it a necessary agent in the successful operation of a business to have gathering facilities in the

country through which we can have available our raw [fol. 224] materials for processing.

Q. Has Fisher maintained these country elevators for a good many years?

A. Yes, for many years, practically from the beginning of our operations which go back to 1911.

Q. Is it considered a rather essential, or non-essential feature of your operation to have these country elevators?

A. Well, sir, we have found it essential, very essential, to have under our direct control these grain supplies which are afforded by country elevators.

Q. Can you explain that as to why that is?

A. Well, perhaps in this way, that the capacity of the plants of ours must be in a position at all times to have available the required grain to maintain that production capacity. Now, of course, it can be said that all of that grain could be purchased from outside dealers without any storage space of our own, but to the extent that we do use outside dealers we find that we are too much delayed in the process of getting the grain to our mill when needed. Therefore we feel that the answer is to maintain the certain reasonable number of elevators in the country that afford us this additional storage capacity.

Q. And you have your own grain on call when you want it immediately?

A. That is right.

Q. Now, did you hear the testimony yesterday of Mr. [fol. 225] Mikkelsen concerning the transit operations that the complainant has at its mills?

A. Yes, I heard Mr. Mikkelsen's testimony.

Q. Does the Fisher Flouring Mills have any similar transit policing problems?

A. Yes, I feel we do. I feel that our capacity as compared to complainant capacity would be sufficient answer to that. Most certainly we have a similar problem in the policing of traffic.

Q. Is the Fisher Flour Mills located on the Great Northern through routes to California?

A. Yes, our company is.

Q. So that you have these same transit problems irre-

spective of the fact that you are located on the through routes?

A. Very definitely so.

Q. Is that, does your operation in policing transit correspond substantially—does the work that you do correspond substantially to the work that is done by the complainant as described by Mr. Mikkelsen yesterday?

A. To answer that, sir, would be yes. We go through perhaps the same motions. The matter of transit supply is of equal concern to our operation where they were and in what quantity that transit might be available is certainly an operating problem that is present with us as it is with complainant.

Q. Does the Fisher Flour Mills Company sell flour in California?

[fol. 226] A. Yes, we sell flour on the California market.

Q. At my request did you make any computation to see what percentage of your total flour sales your company has sold in California?

A. Yes, I have.

Q. Would you tell us what those are?

A. At your request I summarized the sales of flour by my company in California, and in relationship to that as covered by Exhibit 15 presented by witness Mikkelsen, our percentages are substantially under on an average such as 42.7 for the crop year given would be the total of Fisher Flour Mills' business in California. That is contrasted, I believe, with the summation of Exhibit 15 which shows 68.8 percent, so the difference would be the essence which we think the Commission would be interested in.

Q. Do you have the percentage of your California sales, the total flour sales for the last crop year?

A. Yes. For the 1955-'56, it's 41.2.

Q. Do you have anything else you wish to add?

A. I think I would like to make this statement, Mr. Tjossem, that our company being in the business and being a competitor of the complainant reasonably assumes this sort of a position. We don't want to be a dog in the manger in a situation of this kind, but as the complainants have already put into the record, there is strong competi-

tion and we are a part of that competition to which they [fol. 227] refer. And we feel as a business principle, when our business was established here and our plant facility was decided to be located in Seattle, that the managers and operators of our company gave due consideration as to where those localities might be.

Q. You mean the locality of the plant?

A. The localities of the plant to serve the markets. In making those determinations it certainly is good judgment to decide what rail facilities are available.

Now, our company, as evidenced by their location on and being served by all four of the northern transcontinental lines, gave due consideration to locating on the direct line of each of those four railroads, therefore, it never has had the question now being faced by the complainant, nor has it been a problem for Fisher Flour Mills to decide. In other words, those things were absented to begin with, so we feel that by some other arrangement where it be classified subterfuge or otherwise to place a mill not so situated on the same basis as we is probably going through the back door to maintain an equality. Now I don't know how that will be taken by complainants. As I say, we don't want to be dog in the manger on this thing. We feel we spent money and capital investments when we located our plant and certainly competitors should face the same rules and regulations. It's the rule of the road, so to speak. I hope I have made myself clear on that.

[fol. 228] Mr. Tjossem: You may examine.

Mr. Wettrick: No questions.

Exam. Boisseree: I have no questions.

(Witness excused.)

Mr. Tjossem: Mr. Anderson, will you take the stand.

O. N. Anderson was sworn and testified as follows:

Exam. Boisseree: Off the record.

Exam. Boisseree: On the record.

(Discussion off the record.)

Mr. Tjossem, I understand you are circulating an exhibit that you are going to offer about which you interrogated Mr. Welk this morning.

Mr. Tjossem: Yes.

Exam. Boisseree: And that will be marked as Defendant's Exhibit No. 26 and you are offering it yourself as counsel and not through Mr. Anderson?

Mr. Tjossem: I would like to offer Exhibit 26, which is the mining statistics which I interrogated Mr. Welk about this morning.

Do you have any objection, Mr. Wettrick?

Mr. Wettrick: No, I don't.

Exam. Boisseree: I think you indicated this morning you had none, and Defendant's Exhibit 26 is received in evidence.

(Defendant's Exhibit No. 26 was marked for identifica-
[fol. 229] tion and received in evidence.)

Exam. Boisseree: Let the record show that the following were marked for identification in an off-the-record discussion: Defendant's Exhibit No. 27 to and including Defendant's Exhibit No. 38.

(Defendant's Exhibits No. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38, Witness Anderson, were marked for identification.)

Direct examination.

By Mr. Tjossem:

Q. Will you state your name, address and occupation.

A. My name is O. N. Anderson and I am assistant general freight traffic manager of the Great Northern Railway located at 728 Great Northern Railway Building, St. Paul, Minnesota.

Q. How long have you been connected with the traffic department of the Great Northern, Mr. Anderson?

A. About forty-two years.

Q. Working in rates and divisions?

A. Yes.

Q. You are familiar with the rates and the routes involved generally in this complaint proceeding, are you?

A. Yes, I am.

Q. Are you also, Mr. Anderson, familiar with the policy of the Great Northern on whether it will open up gate- [fol. 230] ways or whether it has a policy of attempting to preserve its long haul traffic?

A. Yes, I am familiar with that policy.

Q. Will you state what that policy is?

A. The general policy of the Great Northern Railway has been to retain to its own lines the maximum haul on traffic originating on the Great Northern Railway. The Great Northern policy with respect to traffic to points in southern Oregon and to California is to hold to its long haul traffic for those states. This policy is applicable to grain, including wheat from Montana. The through rates from the Montana triangle on wheat to California apply by the Great Northern Portland Southern Pacific and connections beyond via Great Northern to Spokane, SP & S to Portland, Southern Pacific and connections beyond. Via Great Northern to Hamath, Oregon, Southern Pacific and connections beyond, via Great Northern to Beiher, California, Western Pacific and connections beyond. Via Great Northern to Butte, Union Pacific and connections beyond.

The route via Butte was published as a result of the Commission's order in the 17,000, part 7 grain case. The other railroads serving Montana and the Pacific Northwest such as the Northern Pacific, the Milwaukee and the Union Pacific, generally observe the same routing policy as the Great Northern and endeavor to hold to their lines the longest possible haul. The Great Northern policy of holding its long haul is implemented by the assessment of [fol. 231] a combination of local rates via other routes. We have by this policy closed the Portland gateway commercially by refusing to join in joint through rates that short haul the Great Northern Railway.

Q. I think you mentioned, didn't you, Mr. Anderson, this policy of the Great Northern in respect to retaining its long haul traffic is not unique in this territory?

A. It is not unique and my experience with the other railroads in this territory is that they endeavor to hold the

long haul to themselves as much as they can. I was located in the Seattle office for the past ten years, was just transferred back to St. Paul in May of this year, so I am quite familiar with their practices as I have observed them during the time that I have been on the Pacific Coast.

Q. Have you any idea as to the importance of this wheat traffic to the Great Northern?

A. Yes. Wheat is very important to the Great Northern from revenue standpoint, and we found that last year the revenue on wheat exceeded the revenue on iron ore. Last year the revenue on wheat was $30,405,025. The revenue on iron ore was $28,890,137. The revenue on lumber and lathe was $28,681,276.

Q. Did you make computations of how much revenue from wheat was represented in your total? What percentage it was of your total railway operating income?

A. I did make that computation. It is twelve and a [fol. 232] fraction percent.

Q. It was slightly over twelve percent?

A. It was over twelve percent, less than thirteen percent.

Q. You have several exhibits marked for identification. Will you refer to your Exhibit No. 27 and explain what is shown on that Exhibit?

A. Exhibit 27 is a map of the Union Pacific Railroad and it shows the territory in the States of Washington and Oregon, from which the mills at Waitsburg, Milton-Freewater and Athena can transit grain under through rates to Portland and beyond to southern Oregon and to California. The territory outlined in red is the territory from which the mill at Athena can draw its grain. The territory in blue is the territory from which the mill at Milton-Freewater can draw its grain.

The territory outlined in green is the territory from which Waitsburg can draw its grain.

Q. Is the territory in Oregon part of Idaho and Washington to Portland and south, is that the rate application?

A. Through rates apply from this territory to the territory south of Portland, to Portland and to points in California, and this grain from these origins can be transited from the mills indicated under the through rates.

Q. What railroads are these points that are shown here, which railroad are they located on?

A. This is Union Pacific.

[fol. 233] Q. These are all Union Pacific points?

A. Yes, sir.

Q. Do you have anything more on that Exhibit?

A. No.

Q. Will you turn to Exhibit No. 28.

A. Exhibit 28 is a companion to Exhibit 27 and simply shows the same information from Idaho. We did not have a map that included both Washington, Oregon and Idaho in detail, and therefore we prepared a separate map for Idaho.

Q. Now will you look at your Exhibit No. 29.

A. Exhibit 29 is a map of the Great Northern Railway and covers the territory west, well, covers almost all the whole United States except the trunkline territory, and we have shown on this map by a red line the boundary of it, the western boundary of the eastern transcontinental groups, and we have outlined in red the territory in Oregon on the Southern Pacific.

The Union Pacific maintains joint through rates on grain and grain products from the transcontinental territory to points in southern Oregon, and transit is provided in Union Pacific Tariff 7092-D, ICC No. 5114 at Athena, Milton-Freewater and Waitsburg, so that those mills can draw wheat from Wyoming and Nebraska, Colorado, Kansas, Iowa and other states outlined on the map and transit this wheat at their mills for movement to southern Oregon under joint through rates.

Q. Now, will you turn to your Exhibit marked for identi-

[fol. 234] fication as Exhibit No. 30.

A. Exhibit 30 is a Great Northern map on which we have marked in blue the territory on the Union Pacific in Idaho, Oregon and Washington, from which joint through rates are applicable upon grain and grain products to points in California. The State of California has been outlined in blue on this map. The mills at Athena and Waitsburg can transit wheat from this Union Pacific territory and reach California with their products beyond

Portland via the Southern Pacific and their connections under joint through rates.

Q. The origin territory given here is limited to the Union Pacific stations in Idaho, Washington and Oregon, is that right?

A. Yes, it is.

Q. Now will you turn to your Exhibit marked 31 for identification.

A. Exhibit 31 is a Great Northern map on which we have marked in blue points on the Milwaukee Railroad in Montana, North and South Dakota, from which through rates apply to points in Oregon on the Southern Pacific, south of Portland. These rates are applicable via the Milwaukee Railroad to Plummer, Idaho, Marengo or Spokane, Washington, thence Union Pacific to Portland or East Portland, and the Southern Pacific beyond. The mills at Athena, Milton and Waitsburg—Milton-Freewater and Waitsburg, can transit grain from these Milwaukee origins and reship products to the territory in Oregon beyond [fol. 235] Portland under joint through rates.

Q. Now will you turn to your Exhibit marked 32 for identification.

A. Exhibit 32 is the Great Northern map on which we have marked in blue points on the Milwaukee Railroad in Montana, North and South Dakota, from which joint rates are published on grain and grain products to points in California. The rates apply via the Milwaukee Railroad to Marengo, Washington, Union Pacific to Portland or East Portland, thence Southern Pacific and connections beyond. The mills at Athena, Milton-Freewater and Waitsburg can draw grain from these Milwaukee points in Montana, North and South Dakota, and transit the grain at their mills and reship the products to points on the Southern Pacific and their connections in California beyond Portland under joint through rates.

Q. Now will you turn to your Exhibit marked 33 for identification.

A. Exhibit 33 is a map of the Union Pacific on which we have encircled in red flour mills located in the State of Idaho having a milling capacity of one hundred, hundred-

weights or more per day. I should like to explain Exhibit 33, 34 and 35 all at one time.

Exhibit 34 shows the flour mills in Washington and Oregon and we have outlined, we have encircled the towns at which these mills are located in red.

[fol. 236] Exhibit 35 shows the mills in Montana which we have circled in red.

Q. What is the source of your information for the fact that there is a mill at these various locations you circled red on Exhibits 33, 34 and 35?

A. We obtained this information from the Northwestern Miller, which is a publication issued by the Miller Publishing Company of Minneapolis who publish a list of flour mills in the United States and Canada.

It was our thought in presenting these maps to bring to the Commission's attention that there are approximately fifty-five flour mills in the States of Montana, Idaho, Oregon and Washington, and it is further our view that we should put in this record exhibits which would show the extent to which, the extent from which each of these mills could draw their grain and the extent to which these mills could distribute their products, because we felt that any action taken here with respect to Waitsburg, Milton-Freewater or Athena would have its effect on the general rate structure in the west. We were unable to complete our work on this phase of the case.

Q. That is part of the evidence we would wish to put in at the continued hearing we requested.

A. It is our purpose at the next hearing, or by the modified procedure, a statement which will show the extent to which these mills can draw grain and can distribute [fol. 237] it so that the Commission will have the entire picture before them, because we are certain that if through rates and transit is put into effect at the three mills involved, many other mills located on the Northern Pacific and Milwaukee will seek similar treatment, all of which means a revenue loss or will mean a revenue loss to the Great Northern Railway.

Q. Incidentally, what was the date of the publication of this Northwestern Millers list of mills? How current is that, Mr. Anderson?

A. Well, this was published in 1951. Apparently it was the latest one we could secure.

Q. When you said you would wish to show at a further hearing the origin territory and markets available to these mills, I assume you meant that that would be the origin territory and destination territory available to the mills under joint rates and through routes. Is that right?

A. Under joint through rates.

Q. Do you have anything more on those three exhibits?

A. No.

Q. Now will you turn to the Exhibit marked 36?

A. Exhibit 36 is a statement of the rates on the grain from Washington, Oregon, Idaho, Montana and from the transcontinental territory to representative points in California and southern Oregon. Page 1 of the Exhibit shows the rates from Montana to representative points in Cali- [fol. 238] fornia that will become effective if the Commission grants the petition of the complainant in this case.

At the bottom of page 1 we have shown the origin points from which these rates apply, and I might call attention to the fact that the rate of a dollar eighteen-and-a-half applies from Havre, Great Falls and Shelby, which are considered to be the boundary of the so-called triangle territory.

Page 2 of the Exhibit shows what the rates would be from the Montana triangle to Eugene and Medford with transit to Athena, Milton-Freewater and Waitsburg if the Commission grants the complainant's plea.

I might say that while these rates are made up of arbitraries over the cost, that is simply a method of making a through rate and these are through rates, not combination rates.

Page 3 shows the rates in effect from the transcontinental groups to the territory south of Portland from which territory these mills could draw their grain and transit it and reship to the territory south of Portland. It will be noted that they could reach such states as Nebraska, Kansas, Colorado and Wyoming.

Q. You say here that these rates will apply the destination territory or points south of Portland in the north coast group. What do you mean by the north coast group?

A. I mean by that the territory in Portland. The Union Pacific does not carry joint through rates on grain from [fol. 239] this transcontinental territory to California via Portland. It is my understanding that they have some agreement with the Southern Pacific under which they deliver that business to the Southern Pacific at Ogden and therefore they have no joint through rates to California via Portland.

Q. How far south will these rates apply then? They do apply south of Portland?

A. They apply south of Portland to the Oregon-California line that is outlined on Exhibit No. 29.

Page 4 of this Exhibit shows the rates that are in effect from Union Pacific and Cames Prairie points in Idaho which apply via Union Pacific to Portland and thence Southern Pacific and their connections to points in California.

Page 5 shows similar information from the States of Washington and Oregon.

Page 6 shows the rates from points in Washington and Oregon, and

Page 7 is simply an outline of the groups that apply, an outline of the groups that go along with pages 5 and 6.

Page 8 is a statement of the rates on grain from representative points on the Union Pacific and the Kames Prairie to Portland, Eugene and Medford.

Q. Now will you turn to your Exhibit No. 37.

A. Exhibit 37 is a statement that shows the rates on grain from representative points in Montana and the [fol. 240] Pacific Northwest to Portland and to representative points in California. We have shown in this case the rate, for example, from Great Falls to Portland is Seventy-two cents and the through rate to the California points a Dollar Eighteen-and-a-half, which shows from Great Falls the transit balance over Portland is Forty-six-and-a-half cents.

We have also shown the rates from representative points in Idaho and Washington, and I might just point out one, Cottonwood, Idaho. The transit balance over Portland to San Francisco is Thirty-eight-and-a-half cent; to Fresno, Forty-four. The Exhibit is designed to show

that to a certain territory in central and northern California a lower transit balance can be secured from some of these Idaho and Washington territory than from Montana.

Q. This is a demonstration here of how the complainant has been able to get into northern California on an equal or lesser transit balance beyond Portland than would apply on the through rates if we had such a through rate as essential here, doesn't it?

A. Yes.

Q. In fact, any place that the transit balance is shown in the transit balance over Portland to be less than Forty-six and a half cents which would be the transit balance under the through rate, he could save money by substituting this transit from these other origins to the extent that [fol. 241] those transit balances are less than the Forty-six-and-a-half cents, could he not?

A. Yes.

Q. You don't mean to infer by this exhibit that other mills competitive to the complainant doesn't do the same thing?

A. No, I do not.

Q. Other mills can do the same thing as indicated by this exhibit that the complainant can do?

A. Yes.

Q. Now will you look at your Exhibit No. 38.

A. Exhibit 38 is a statement which shows the transit charges that apply at Athena, Milton-Freewater or Waitsburg on grain from Montana or the Pacific Northwest under joint through rates. It will be noted that in the case of Athena there is no out-of-line transit charge made. However, in the case of Milton and Waitsburg an out-of-line charge of Three-and-three-quarters Cents per hundred pounds is assessed on the grain that originates in southern Oregon.

Q. There is a backhaul on that particular origin, is there, into those two points?

A. Yes.

Q. Do you have anything else on those Exhibits, Mr. Anderson?

A. No, that is all.

Q. Mr. Anderson, have you anything to say on the basis for the rates that you have shown are published to apply from Montana to the north Pacific Coast ports?

[fol. 242] A. Yes. The present rates on wheat from the Montana triangle to southern Oregon and to California are the rates that were prescribed or approved by the Commission in Docket 17,7205, I.C.C. 301 subjected to the ex parte increases since that time. The first one was ex parte 1, 2 and 3, and since then we have had ex partes 162, 166, 168, 175, and 196. The present rates reflect the Commission made rates subject to the general increases which I have named.

Q. I think you answered me in respect to the rates to California and southern Oregon. What is the basis of the rates to Montana and north Pacific Coast ports?

A. The rates from Montana to the north Pacific Coast ports were fixed in the same proceeding. The Commission approved a rate of Thirty-nine cents from Montana to the north Coast; in the first decision they prescribed a rate of Forty-two cents, but the Pacific Northwest railroads advised the Commission that they were willing to continue the rates which they then had in effect, which was Thirty-nine cents from part of the territory, so the Commission in effect found our Thirty-nine cents adjustment was reasonable and did not require us to maintain the Forty-two cents rate, so that the rates to Portland, Seattle and Tacoma in effect at the present time are the rates which the Commission fixed in Docket 17,000 subjected to the general increases.

Q. Do you have anything else you wish to offer at this time?

[fol. 243] A. Some discussion was had this morning about port to port rates. Prior to World War II, we had in effect port to port rates, that is, rates from Portland to San Francisco, Los Angeles, which were designed to meet the rates of the water lines operating from the north coast to California. After World War II the Commission entered into an investigation of these rates and required us to show cause as to why they should continue those rates which were fourth-section rates. The water service had diminished

very substantially and we were not able to justify the continuance of the port to port rates and the Commission, in proceeding, I think it was Docket 19721, required that those rates be cancelled and that brought into effect the so-called normal rates that were then published in the tariff from the north coast territory to California.

Another thing that was mentioned was this route via Butte, Montana. At the time of the grain case we had in effect joint through rates from Montana to California via our long haul routes through Portland. The Commission in that case permitted us to continue those rates via those routes, but required us to also publish an additional route that is the route via Butte. I want to make it clear this was not done voluntarily by the Great Northern, the mills at Ogden were particularly active in seeking transit under those rates, and they were able to persuade the Commission in that case that the through rates should be made effective via Butte so that they could transit this grain. [fol. 244] The Great Northern had no control over the transit practices of the Union Pacific, once the grain was delivered to them at Butte. We did not provide for corresponding transit at points in Montana on grain or products that moved out via Butte and that brought on the Great Falls case under which the Commission did later require us to provide for transit at Great Falls.

I think that is all I have to offer, Mr. Tjossem.

Mr. Tjossem: I will offer my Exhibits 27 through 38, inclusive.

Exam. Boisseree: Any objection to the receipt of those Exhibits, Mr. Wettrick?

Mr. Wettrick: No, no objection.

Exam. Boisseree: The Exhibits marked for identification as Defendant's Exhibit No. 27 to and inclusive of Exhibit No. 38 are received in evidence and the witness is now available for cross-examination.

Mr. Tjossem: That is correct.

(Defendant's Exhibits Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38, Witness Anderson, were received in evidence.)

Exam. Boisseree: We will take a short recess.

(Short recess.)

Exam. Boisseree: We will continue the proceedings, gentlemen. The witness is now tendered for cross-examination.

[fol. 245] Mr. Wettrick: Yes.

Cross examination.

By Mr. Wettrick:

Q. Mr. Anderson, you are testifying here only for the Great Northern, are you not?

A. Yes, sir.

Q. And you explained its policy to hold traffic on its own line and said that that is the policy of other railroads?

A. Yes.

Q. And it was for the policy that you referred to it on the part of the Great Northern, you said that you closed Portland gateway commercially to traffic routed over the route in general?

A. Yes.

Q. Then at the conclusion of your testimony you referred to the Great Falls case which we have referred to as the General Mills case, as a result of which the Great Northern was required to transit at Great Falls at the through rate prescribed by the Commission which the Great Northern had refused to grant previously. Isn't that correct?

A. That is correct.

Q. And because of that refusal the combination rates on Great Falls were applicable on traffic that was transitted there?

A. No. The combination was applicable on shipments transitted Great Falls if they moved out by the Butte gateway. We had in effect through rates and the transit via [fol. 246] our long haul rates to California.

Q. Yes, I had reference to the route via Butte which was involved in that case.

A. You are correct so far as the Butte gateway is concerned.

Q. And the Commission said the route was there but it

was closed commercially because of the refusal of the Great Northern to grant transit at the through rate?

Mr. Tjossem: Just a moment. I am going to object to that as being argumentative as to what the Commission said or didn't say. The report will speak for itself.

Exam. Boisseree: Normally that is true. I think it is preliminary to another question.

Mr. Wettrick: Mr. Anderson referred to that.

Exam. Boisseree: I will overrule the objection if the witness doesn't agree to your interpretation of it. He can so state.

By Mr. Wettrick:

Q. In the present case the route via Portland is closed commercially as you testified because the combination rates are applicable rather than the joint through rates available over other routes, isn't that correct?

A. Yes.

Q. And since we mentioned the Great Falls case, and in view of what has been said heretofore, the Great Northern took that case into court, didn't it?

A. I believe so. I am not too familiar with that.

[fol. 247] Q. To the Supreme Court, you know that, don't you?

A. I did not handle that case, Mr. Wettrick.

Q. You know that the Supreme Court and the three-judge court sustained the Commission's decision in that case?

A. I know that we were required to publish transit and which we have done.

Q. On your Exhibits 33, 34 and 35 which you discussed together, you show numerous mills—

A. (Interrupting) Yes.

Q. (Continuing) —by circling the points in red?

A. Yes, sir.

Q. And you got those from, what did you say, the Western Miller?

A. No, the Northwestern.

Q. Northwestern Miller, that is a trade publication, isn't it?

A. Yes, sir, it is.

Q. And you didn't check to determine how many of these mills are operating?

A. No, I did not.

Q. On Exhibit 35 you show Great Falls. There are two mills at Great Falls, are there not?

A. Yes.

Q. And those two mills can ship to California at the joint through rate to which reference has been made repeatedly on California via the Butte gateway or any of the western [fol. 248] gateways, can they not?

A. They can ship via the Butte gateway or via the Portland, Beaver or Chemult gateway.

Q. Over the Great Northern?

A. Over the Great Northern.

Q. Not via the S. P.? Not Portland via the S. P.?

A. Yes, the rates will apply by the Great Northern to Portland to Southern Pacific and connections thereon.

Q. All the routes that we have been talking about that are available at the joint through rate to the mills in the Pacific Northwest?

A. Well, I want to make it clear that these rates applied only via the so-called Great Northern routes. There are no joint rates via Montana and the Northern Pacific.

Mr. Wettrick: In connection with these exhibits, Mr. Examiner, these three, they were just handed to us before the witness was put on the stand and I rather felt that the Great Northern might have handed these to us before so we could look them over. We furnished them with a set of our exhibits Monday noon, and that makes me request leave, if we should care to do so in connection with such further presentation as we may make under the modified procedure, as to the rest of the case that we have considered that we be permitted to show whatever we wish in regard to these three exhibits.

Exam. Boisseree: Well, my understanding of the ar- [fol. 249] rangement that counsel and the Examiner agreed to is that you will have the full right of rebuttal which means you can rebut any of the evidence either today or subsequently.

Is that correct, Mr. Tjossem?

Mr. Tjossem: Certainly. That was part of my offer.

Mr. Wettrick: Very well. Now, in connection with your Exhibit No. 36—

Mr. Tjossem (interrupting): Pardon me, Mr. Wettrick. On that subject Mr. Examiner has indicated that our source of material for those three exhibits was 1951 and if the complainant has more current and accurate information as to active mills in that territory, I would certainly appreciate having it furnished and we would correct those exhibits accordingly.

By Mr. Wettrick:

Q. In the exhibit to which I referred you say "proposed rates", and, of course, you mean by that the rates which complainant contends should apply over the routes via their mills?

A. Yes, sir.

Q. On page 3, you show rates of a Dollar Eighteen-and-one-half cents from points in North and South Dakota on the Milwaukee?

A. Yes.

Q. And also Nebraska and Kansas on the Milwaukee, or is that the Burlington?

[fol. 250] A. That is any of the railroads that operate in that territory. The Burlington, the Union Pacific, the Rock Island, the Missouri Pacific, they all have these joint through rates. Now in the case of the Union Pacific, they require that this business of Nebraska and Kansas be delivered to them at junctions at or near the Missouri River. The through rate does not apply where these lines would deliver the business to them at Colorado junctions, for example.

Q. Yes, that group of rates that you show there from Nebraska and Kansas is evidently the one that Mr. Welk referred to in his testimony when he said that grain could move from Nebraska and Kansas via the Burlington to Laurel, Montana, then the Northern Pacific on which they could transit at their mills in the Walla Walla territory and ship to California at that rate.

A. That rate is available via that route.

Q. And those routes incidentally are considerably longer, are they not, than any route from the origin territory in this complaint in Montana over the Great Northern to California?

A. Well yes, but the rate was not made via the northern routes. The rates from this territory to southern California were made via the direct lines and the northern routes had to meet those rates if they wanted to be competitive.

Q. When you go east on the Great Northern into the groups of the so-called central territory, you get into rates [fol. 251] —I think it was shown here as One Dollar Twenty-nine cents to California?

A. You grade up into the rates. I don't know exactly—

Q. (Interrupting) Whereas in corresponding territory to the south thereof and even to the south and east thereof this lower rate of One Dollar Eighteen-and-a-half applies?

A. This rate of One Dollar Eighteen-and-a-half is the rate that applies from the Missouri River to California.

Q. To California?

A. Missouri River to the North Coast and from the Twin Cities to the North Coast.

Q. Yes. And the Burlington and the Northern Pacific have chosen to meet that direct rate over their route through the Portland gateway?

A. They have chosen to meet it, yes.

Q. Yes.

A. I might say that the Great Northern also participated in that rate via Laurel in its line to Portland or Beaver.

Q. Do they, well, I am glad you mentioned that.

A. Well, that is no secret. It is in the tariffs, has been for years.

Q. I was surprised to learn that that rate applied over the Northern Pacific and now that recalls the fact that the Great Northern does have a line down to Billing, does it not, where the connection—or Laurel—where it connects with the Northern Pacific or Burlington?

[fol. 252] A. Very definitely. It's a very important line.

Q. You say that grain could be brought from Omaha by the Burlington to Laurel, Montana, turned over to the

Northern Pacific or the Great Northern and move over, we have already traced the Northern Pacific over the Great Northern up through Great Falls, and Shelby, west through Spokane and Everett and Seattle, Portland, SP&S, and the lines of the Great Northern beyond Portland to California for a Dollar Eighteen-and-one-half cents?

A. Well, I think you have got too many lines in there. The Dollar Eighteen-and-one-half does apply from Omaha to Seattle, Tacoma, Portland or San Francisco, and it does apply via the C.B.&Q. via the Great Northern and its connections—not only the Great Northern, the Northern Pacific and the Union Pacific except in the case of the Union Pacific, they do not apply via Portland presumably because the Southern Pacific wouldn't join them via Portland.

Q. Don't you think in view of that and other things the Great Northern is a little bit tough so far as the complainants are concerned?

A. No. The Great Northern have a lot of respect for the complainants, but we view this as something that is going to hurt us materially from a revenue standpoint and that is our whole objection.

Q. We will learn all about that when you get in your [fol. 253] additional testimony.

A. We hope to show by that testimony just how badly we will be hurt. Right now we can't tell you that.

Q. And if it isn't too bad, will you give us the rates?

A. I don't think I want to answer that, sir.

Mr. Wettrick: That is all.

Redirect examination.

By Mr. Tjossem:

Q. Mr. Anderson, just one question. The way Mr. Wettrick phrased his question—as I recall he said we closed the Portland gateway by making these combination rates—was that route ever open to your knowledge? Was there a route from Montana through Union Pacific to Spokane to Portland and the Southern Pacific?

A. To California?

Q. To California.

A. No. I think he said we closed it commercially.

Q. The fact is, we never opened it commercially. Have we ever?

A. That is right. We have never had joint rates to California via Spokane, Union Pacific to Portland, because we want to haul that business ourselves to Portland or in connection with the S.P.&S.

Mr. Wettrick: In view of those questions I want to ask Mr. Anderson another question or two.

Recross examination.

By Mr. Wettrick:

Q. Couldn't any shipper ship any commodities from any [fol. 254] point on the Great Northern under a through bill of lading to any point in Oregon south of Portland and to California by paying the combination rates?

A. Well yes, it is customary practice to tender a bill of lading which shows the origin and destination, and if there are no joint through rates of course, combination rates are applied.

Q. Doesn't that mean that while there is no route specified in the Great Northern tariff, and while you have closed it commercially as you say so far as these joint rates are concerned, it is closed commercially in this case for this traffic because you insist on the combination rates and the shipper can't pay them in competition with those having the more favorable rates? The answer to that is yes, isn't it?

The Witness: Will you read that question?

(Question read.)

A. No, not in my book. I think you have to have a joint through rate to have a through route.

Q. Or a through route to have a joint through rate, which?

A. Well, if you have a joint through rate obviously you have a joint through route.

Mr. Wettrick: That is all.

Mr. Tjossem: I have nothing further.

Exam. Boisseree: Your exhibits have been received in evidence, Mr. Anderson. I have no questions. You are excused.

[fol. 255] (Witness excused.)

Mr. Tjossem: I will call Mr. Kasen.

M. A. Kasen was sworn and testified as follows:

Direct examination.

By Mr. Tjossem:

Q. Will you state your name, address and occupation for the record.

A. My name is M. A. Kasen, Traffic Manager, Sentinel Mills, Incorporated, office at 340 Central Building, Seattle.

Q. You are employed by the Sentinel Flouring Mills Company?

A. Yes, I am.

Q. In what capacity, Mr. Kasen?

A. Traffic manager.

Q. How long have you worked for that company?

A. Slightly over three-and-a-half years.

Q. That company is engaged in the business of milling flour?

A. Yes, we are.

Q. Where do you have mills?

A. We have eight plants altogether. Those that are manufacturing only flour are located at Spokane, Washington, and a small mill at Hamilton, Montana. We have flour and feed mills at Portland, Oregon, and Wenatchee, Washington, and strictly feed mills are located at a number of other positions in the northwest.

Q. What is the combined capacity of your flour mills? [fol. 256] A. The flour capacity of our mills is 11,300, hundredweights per day.

Q. You sell flour in California, do you?

A. Yes, we do.

Q. At my request did you make any check to see what

percentage of your flour sales, of your total sales are to California?

A. Yes, I did.

Q. Will you give me that figure?

A. Yes. It was rather surprising to me that slightly less than thirty-one percent of our bakery flour production was sold in California. The exact figure is 30.87 percent.

Q. For what period, Mr. Kasen?

A. That was the fiscal year July 1st, 1955, through June 30th, 1956.

Q. You don't have the figures for the other years?

A. I do not, not here, but they are less than thirty percent I have been reliably informed by our sales department.

Q. In other words for the year that you gave us it is something a little more than what you have been having down there?

A. Yes, because our flour sales in California were more this past year than they had been for a number of years.

Q. Do you have anything to do with the transit operation on grain for your company?

A. Yes, I do. I supervise it for all the plants.

Q. Did you hear Mr. Fuller's testimony with respect to [fol. 257] Fisher's transit policing and problems?

A. Yes.

Q. Would you say that your situation is comparable to that described by Mr. Fuller?

A. Yes, I would. In fact, I believe ours is more so because of the complexity of our operation. In fact, I am in constant touch with all the mills either by telephone or teletype and make regular trips to these various mills to go over their transit problems.

Q. I take it then you have similar problems as testified to here by the complainant, that you have to give almost daily supervision to this transit situation and the policing transit.

A. Yes, I do.

Q. Did you think your situation is any more or less complex than that described by the complainant's witness?

A. I don't believe it would be any more complex but certainly it is probably as great as theirs is.

Q. Does the Sentinel Flour Mill Company maintain any country elevators in Montana?

A. Yes, we do. We have a total of eighteen there altogether.

Q. Do you know the capacity, the combined capacity of those?

A. I don't have the figures here in the total capacity. I do know that in the case of Washington and Montana we have over 5,000,000 bushels in the country capacity.

[fol. 258] Q. Did you hear Mr. Fuller's statements as to the fact that Fisher Flouring Mills maintain country elevators and the reasons they maintain those elevators?

A. Yes, I did.

Q. Would you say that that testimony was representative of the same policies of your company or do you have different reasons for maintaining these elevators?

A. Our reasons are no different than theirs. I believe it could be said that our testimony would be along the same lines.

Q. Do you have anything else you wish to add to this record?

A. Nothing further other than to say that we do have a considerable investment in our flour mills and naturally we are trying to maintain our markets in California.

Mr. Tjossem: You may examine.

Mr. Wettrick: I have no questions.

Exam. Boisseree: You are excused.

(Witness excused.)

Mr. Tjossem: I just recall I overlooked one subject I wanted Mr. Anderson to cover. I wonder if I could recall him just for that purpose.

Exam. Boisseree: Yes.

O. N. Anderson was recalled, and having been previously sworn, further testified as follows:

Direct examination.

[fol. 259] By Mr. Tjossem:

Q. Mr. Anderson, you testified here that the complainant's mills are situated on the Union Pacific and take the

Montana grain of the Great Northern from us at Spokane and have a through route into Portland. Have you made investigation to determine when and why that route was established?

A. Yes. The Great Northern line was completed to Seattle in 1893. We had no way of reaching Portland at that time. Portland was a thriving and port city on the Pacific Coast in those years. In order to get into Portland the Great Northern joined the O.R.&N. That is the Oregon Railroad & Navigation Company, in joint through rates to Portland effective August 1st, 1894. The Great Northern reached Portland over its own rails from Seattle under trackage agreement with the Northern Pacific in 1909. The S.P.&S. Railroad was constructed jointly by the Great Northern and Northern Pacific between Seattle and Portland and service—

Q. (Interrupting) You mean between Spokane and Portland?

A. Between Spokane and Portland. And service over the S.P.&S. to Portland began in 1910. The rates that we published in connection with the Union Pacific via Portland was limited to Portland and intermediate territory. We did not put in joint rates to the territory north of Portland. Now I probably should say that the Union Pacific subsequently absorbed the old O.R.&N. Our joint rates with the [fol. 260] Union Pacific does cover territory on the Union Pacific west of Huntington, including branches, but does not apply to the territory north of Portland.

Q. That completes your statement on that?

A. Yes.

Q. Just one other question, Mr. Anderson. Has the Great Northern to your knowledge ever solicited any grain business or flour business over, through Portland via this Union Pacific-Southern Pacific route?

A. To California?

Q. Yes.

A. Or southern Oregon?

Q. Yes.

A. Not to my knowledge.

Mr. Wettrick: You naturally wouldn't solicit business to pass from Portland over Southern Pacific to points in Oregon, would you?

The Witness: I said we didn't, to my knowledge.

Mr. Wettrick: Did you ever solicit business to move over the Great Northern down to Klemult and Beiher?

The Witness: From Montana?

Mr. Wettrick: Yes.

The Witness: Surely.

Mr. Wettrick: In other words, well, maybe to get down to the point I should say from Montana over the route via complainant's mills to Portland.

[fol. 261] The Witness: No.

Mr. Wettrick: You haven't wanted that, have you?

The Witness: You are talking about California now?

Mr. Wettrick: Yes. That would have been contrary. You want the haul from Everett to Seattle to Portland, therefore you have commercially closed the routes via complainant's mills?

The Witness: We are seeking the traffic via our long haul routes.

Mr. Wettrick: If this route via complainant's mills should become effective under the application of the joint rates requested, would the Great Northern apply that rate over its routes beyond Portland to California?

Mr. Tjossem: Mr. Anderson, in answer to that question, don't answer unless you know.

The Witness: In the first place this complainant seeks joint through rates via Portland and the Southern Pacific.

Mr. Wettrick: Yes.

The Witness: Whether we will voluntarily put in the same thing via Beaver and the Western Pacific, I am not in a position to say at this time.

Mr. Wettrick: Chances are you won't.

Mr. Tjossem: I object to it as being immaterial.

Exam. Boisseree: The objection is overruled.

Mr. Wettrick: As a railroad man would you recommend it?

[fol. 262] The Witness: In the first place the answer isn't as simple as it seems. What I would find out first, is what sort of a division arrangement we can work out with the Union Pacific and what division arrangement via Portland and what division arrangement we could work out via Bend, and I would have to weigh those to see whether it

would be advantageous to us to put the rates in via Beaver, so I am just not in a position to say what I would recommend at this time.

Mr. Wettrick: Do you know whether you handle substantial amounts of grain or grain products over your routes south of Portland to California that originate in Montana and move via western gateways?

The Witness: Well, I know that we handle substantial volume of flour into California via Portland and via Beaver and I know that a good deal of that is milled from wheat originating in Montana. But the volume of it I don't know, and that is the information that we want to supply for this record.

Mr. Wettrick: Yes. Fisher Flouring Mills Company and Sentinel Flour Mills Company use that route, don't they, on some of their shipments?

The Witness: Yes, they do.

Mr. Wettrick: And if joint rates were established for the complainant's mills the chances are you would welcome their traffic out of Portland as well as the traffic of the other mills?

[fol. 263] Mr. Tjossem: That is objected to as being repetitious.

Exam. Boisseree: The objection is sustained. He gave you an answer on that, Mr. Wettrick. He said he wouldn't know what he would do.

Mr. Wettrick: All right, that is all.

Mr. Tjossem: That is all the defendant, Great Northern, has at this time.

(Witness excused.)

Exam. Boisseree: Well, I think the record fully shows already the agreement between counsel as to the manner in which we will proceed in the further consideration of the complaint in this proceeding, and I don't think we need to go into it again. So at this time unless there is something further from someone, from either of the counsel, why we will adjourn this hearing. Unless something develops that none of us know about the hearing will be completed under the so-called modified procedure that has already been discussed in the record. The dates and schedule of the pres-

entation is to be dictated either by an order or hearing order emanating from the Commission at some further date. There will be a delay in that pending receipt of the transcript so that we may have available the statements of counsel in support of their respective positions.

Is there anything further from Mr. Wettrick?

Mr. Wettrick: Nothing.

[fol. 264] Exam. Boisseree: Mr. Tjossem?

Mr. Tjossem: No, sir.

Exam. Boisseree: We will adjourn the hearing at this time.

(Whereupon, at 5:00 p.m., October 4, 1956, the hearing in the above case was adjourned.)

[fol. 266]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 32015

PRESTON-SHAFFER MILLING CO.,

vs.

GREAT NORTHERN RAILWAY COMPANY, et al.

DEFENDANTS' FURTHER PRESENTATION UNDER VERIFIED STATEMENTS AND EXHIBITS—March 1, 1957

Preliminary Statement

At the initial hearing in this proceeding it was determined that the defendants required a further period of time to complete their presentation. The parties agreed to a submission of further evidence in writing without further oral hearing, and the Commission, by its notice of November 19, 1956, issued in the above proceeding, directed defendants to complete their presentation by the filing of verified statements and exhibits prior to March 1, 1957.

The following verified statement and exhibits are submitted pursuant to the Commission's said notice.

[fol. 267] AFFIDAVIT OF ERNEST F. McGUIRE

State of Washington)
County of King) ss.

Ernest F. McGuire, being first duly sworn on oath deposes and says:

I am General Freight Agent of the Great Northern Railway Company, with offices at Seattle, Washington. I have been engaged in railroad freight traffic work for thirty-one (31) years, during which time I have participated in many rate cases before the Interstate Commerce Commission and various state commissions. I am familiar with the issues involved in this proceeding, and have prepared the following exhibits and data hereby submitted on behalf of defendants:

Exhibit No. 40 shows the total movement of wheat and wheat flour that moved via the Great Northern Railway from points in Montana to points in California for the year of 1955, broken down by destinations in California, and showing the tons hauled and the Great Northern and S.P. & S. Railway revenues secured on this traffic to each destination.

Exhibits Nos. 41, 42, 43 and 44 show how the movement covered by Exhibit No. 40 was broken down via the Portland or Chemult, Oregon, Bieber, California and Butte, Montana gateways and showing the tons and revenue to each of the California destinations involved.

[fol. 268] The tonnage and revenue figures shown on Exhibits Nos. 40 to 44, inclusive, were taken from the records of the Great Northern Railway Accounting Department.

The record in this case shows that the Preston-Shaffer Milling Company have a milling capacity of 5300 hundred weights per day (T. 174). Based on a 300 day operation (T. 184), this represents 1,590,000 hundred weights per year capacity. It takes 2.33 to 2.35 bushels to make a hundred weight of flour. (T. 176). At 2.34 bushels per hundred weight of flour, I calculate that 3,720,600 bushels

is the annual consumption of complainant's mills. In the 1955-1956 crop year, 65.8% of capacity was sold in California (Exhibit No. 15), of which 90% contains Montana hard spring wheat, 80% of which had 50% or more of hard spring wheat (T. 183). Since Preston-Shaffer milling capacity was 3,720,600 bushels and 65.8% was sold in California, it means 2,448,155 bushels were sold in California. Ninety per cent contained Montana hard spring wheat, i.e., 2,203,339 bushels sold in California contained Montana hard spring wheat. Eighty per cent had 50% or more of Montana hard spring wheat or 1,762,712 bushels. Assuming that 80% contained an average of 75% hard spring wheat, it would mean that 1,322,034 bushels of hard spring wheat was used on this California tonnage. 1,322,034 bushels, at 60 lbs. per bushel, produces 79,322,040 pounds or 39,660 tons, which we calculate is the tonnage of flour shipped by Preston-Shaffer to California made from Mon- [fol. 269] tana hard spring wheat.

Exhibit No. 45 is a statement that shows the estimated Preston-Shaffer tonnage to California (39,660 tons) distributed to California destinations in the same ratio as was the total tonnage from Montana shown on Exhibit No. 40. It shows the Great Northern revenue we would secure on 39,660 tons under existing joint through rates from the Montana Triangle via Great Northern, Portland, Southern Pacific and connections and also shows the revenue the Great Northern Railway secures under joint through rates from the Montana Triangle to Portland, Oregon via Great Northern, Spokane, Union Pacific.

We have no agreed divisions on Montana wheat or flour to California via Spokane, Union Pacific, Portland, Southern Pacific, but if we were required to establish such joint through rates, the Southern Pacific Company must be allowed the same revenue south of Portland as they secure on the traffic now delivered to them by the Great Northern Railway at Portland. Our usual basis for dividing revenue with the North Coast Lines on traffic between North Coast territory and Montana is mileage prorate, minimum 25% to the short line. In order to determine our average revenue, we prepared Exhibit No. 46. We selected points on the Great Northern Railway in the Montana Triangle having a

production during the 1955-1956 crop year of 500,000 bushels or more. We thus find an average mileage from [fol. 270] these origins to Portland of 1016 miles and to Spokane of 503 miles. The Union Pacific distance from Spokane to Portland is 370 miles, so that the Great Northern Railway would earn 58% and the Union Pacific 42% out of the revenue accruing to the lines north of Portland.

Exhibit No. 45 shows that the Great Northern Railway earns $506,774.00 on 39,660 tons of wheat from the Montana Triangle to California for its haul from the Montana Triangle to Portland. If these rates are published via Great Northern, Spokane, Union Pacific, Portland, Southern Pacific, the Great Northern will earn 58% of $506,774.00, or $293,931.00. Exhibit No. 45 also shows that the Great Northern Railway now earns on 39,660 tons of Montana Triangle wheat to Portland via route of Great Northern, Spokane, Union Pacific, $347,422.00 as compared to $293,931.00 out of joint through rates to California, or a revenue loss of $53,491.00.

Exhibit No. 47 shows List of Stations and Flour Mills in Montana that have a milling capacity of 400 hundred weights or more each 24 hours. These stations are encircled in red on Exhibit No. 35. In addition to the milling capacity, as shown in the Northwestern Miller for 1953, we have also shown the capacity as developed by our field men as of December, 1956.

Exhibits Nos. 48, 49 and 50 show similar information for the States of Idaho, Oregon and Washington. These mills are also marked in red on Exhibits Nos. 33 and 34.

[fol. 271] Exhibit No. 49 shows that the mill at Helix, Oregon has a milling capacity of 1250 hundred weights each 24 hours. The mill at Island City has a milling capacity of 400 hundred weights each 24 hours. The mill at Pendleton has a milling capacity of 2400 hundred weights each 24 hours. The mill at The Dalles has a milling capacity of 5,000 hundred weights each 24 hours. Exhibit No. 50 shows that the mill at Cheney, Washington has a milling capacity of 2200 hundred weights each 24 hours. Below is a tabulation of milling capacities of these mills:

Helix, Oregon	1250	hundred	weights
Island City, Ore.	400	"	"
Pendleton, "	2400	"	"
The Dalles, "	5000	"	"
Cheney, Wash.	2200	"	"
Total	11,250	"	"

Based on a 300 day operation per year, 11,250 hundred weights per 24 hours makes 3,375,000 hundred weights, which at 2.34 bushels per hundred weight produces 7,897,500 bushels consumed by these mills per year. We believe these mills will market in California if joint through rates are established which would permit transit at their milling points. The experience of Preston-Shaffer is that of their milling capacity of 3,720,600 bushels, 1,322,034 bushels, or 36% of their capacity during the last crop year, was Montana hard spring wheat used in producing flour sold in California.

Based on the experience of Preston-Shaffer, it is rea- [fol. 272] sonable to assume that these other mills will consume for marketing in California 36% of their milling capacity, or 2,843,100 bushels of Montana hard spring wheat. At 60 pounds per bushel, 2,843,100 bushels would be 170,586,000 pounds, or 85,290 tons. Based on the premise that we could work out the same divisions with the Northern Pacific on wheat milled at Cheney and Helix, as outlined for the Union Pacific, the Great Northern earnings per ton on wheat milled at Helix, Island City, Pendleton, The Dalles, and Cheney would be the same as that milled at Athena, Freewater and Waitsburg.

Exhibit 45 shows Great Northern revenue on 39,660 tons of wheat under joint through rates from the Montana Triangle to California via Great Northern, Portland, Southern Pacific and connections to be $506,774.00 or $12.77 per ton of 2,000 pounds. Under such joint through rates via Great Northern, Spokane, Union Pacific, Portland, the Great Northern would receive 58% of $12.77 per ton, or $7.41 per ton. Exhibit 45 shows the Great Northern revenue from the Montana triangle to Portland out of the present rates via Great Northern, Spokane, Union Pacific be

$8.76 per ton. The Great Northern will therefore suffer a minimum revenue loss of $1.35 per ton ($8.76 less $7.41) if joint through rates are established from the Montana Triangle to California via Great Northern, Spokane, Union Pacific, Portland, Southern Pacific beyond. The loss to the [fol. 273] Great Northern Railway of $1.35 per ton on 85,290 tons, which we believe the mills at Helix, Island City, Pendleton, The Dalles and Cheney would ship to California under joint through rates from the Montana Triangle, would be $115,141.50 per year.

To the extent that these mills would secure sales of flour now sold by mills on the Great Northern Railway, our loss would be much greater, since we earn $12.77 per ton from the Montana Triangle to Portland out of joint through rates to points in California, and would earn $7.41 per ton (58% of $12.77) from the Montana Triangle to California under joint through rates via Great Northern to Spokane, and connections beyond via the Portland Gateway, or a loss of $5.36 per ton. A loss of $5.36 per ton applied to the tonnage (85,290 tons) we believe the Helix, Island City, Pendleton, The Dalles and Cheney mills would move to California under joint through rates from the Montana Triangle would amount to a potential of $457,154.40.

Mills located on railroads in the states of Montana, Idaho, Oregon and Washington, as listed on Exhibits Nos. 47, 48, 49 and 50, are, with very few exceptions confined in their operations to wheat which they can draw from shipping points on the railroads which serve their mills. In other words, there is no cross hauling permitted of grain from origins on one railroad to a transit location on another railroad for processing and subsequent reshipment at through rates. As illustrative of this take Townsend, [fol. 274] Montana on the Northern Pacific Railway, as shown on Exhibit 47, where transit is authorized per Northern Pacific Railway I.C.C. 9808. The mill at that point can draw Northern Pacific wheat from Montana and North Dakota for milling and subsequent reshipment to the Pacific Coast, including California under through rates in Agent W. R. Watson's I.C.C. 888 and Agent J. P. Haynes' I.C.C. 1577, but cannot and does not draw Great Northern Railway or C.M.St.P.&P. Railroad Montana or North Dakota

grain. This is equally true for Great Northern Railway transitors in that they cannot draw Northern Pacific and C.M.St.P.&P. Railroad grain on a basis of through rates.

The same situation exists with respect to mills in Idaho as listed on Exhibit No. 48 where, as example, the mill at Twin Falls on the Union Pacific Railroad operating under transit authorized in Union Pacific I.C.C. 5114, can and does draw wheat originating on the Union Pacific, but cannot draw C.M.St.P.&P. Railroad, Great Northern Railway or Northern Pacific Railway Montana wheat for processing and reshipment at through rates.

In the state of Washington the situation is no different as to the mills listed on Exhibit No. 50. As example, the mill at Wenatchee operating under transit per Great Northern I.C.C. A-8683, can and does draw Great Northern Railway Montana grain for processing and subsequent reshipment to the Pacific Coast, including California, at through [fol. 275] rates contained in Agent W. R. Watson's I.C.C. 888 and Agent J. P. Haynes' I.C.C. 1577. This transitor cannot draw C.M.St.P.&P. Railroad, Northern Pacific or Union Pacific wheat for processing and subsequent reshipment at through rates to the same destination territories.

These examples could be repeated many, many times, but the ones cited are representative of the situation. Considering the limitations of transitors generally, as illustrated by the examples we have cited, the mills of Preston-Shaffer are today more advantageously situated than most of their competitors located at transit points other than on the Great Northern and S.P.&S. in that they do have Great Northern Railway Montana grain available to them, even though the through rates under which it can move via the Union Pacific are limited to Portland, Oregon and intermediate territory.

Ernest F. McGuire

Subscribed and sworn to before me this 27th day of February, 1957.

Robert F. Garing, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 276] Certificate of Service (omitted in printing).

[fol. 277]

EXHIBIT No. 40

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

MOVEMENT OF WHEAT AND WHEAT FLOUR FROM MONTANA TO CALIFORNIA

TOTAL—BY DESTINATION

YEAR 1955

Destination	Tons	Great Northern Revenue	S.P.&S. Revenue
Atascadero	40	$ 582.89	
Bakersfield	3657	51,654.75	
Beverly Hills	5511	56,608.72	
Calexico	3307	33,214.79	
Corcoran	30	449.17	
Culver City	390	4,064.18	
Eureka	960	10,884.08	
Fresno	3925	51,834.18	
Fruitvale	90	1,458.44	
Glendale	30	323.81	
Hanford	334	4,195.59	
Lodi	3896	53,824.08	
Los Angeles	81791	891,135.88	$40,760.47
Montebello	1652	9,916.22	
North Hollywood	1977	21,235.88	
Norwalk	30	410.66	
Oakland	3745	38,999.69	4,983.80
Pasadena	30	321.39	
Placentia	30	394.60	
Porterville	1954	28,647.94	
Puente	898	9,692.10	
Sacramento	9409	135,198.63	1,574.70
San Bernardino	310	3,709.68	155.84
San Diego	4678	59,909.43	
San Francisco	4123	65,001.68	
San Jose	80	1,139.73	
San Leandro	247	3,984.12	
San Luis Obispo	357	4,118.12	

Destination	Tons	Great Northern Revenue	S.P.&S. Revenue
Santa Barbara	273	$ 2,997.82	
Santa Cruz	1026	13,218.87	
Santa Rosa	40	254.23	$ 139.05
San Ysidro	110	863.22	
Stockton	231	4,178.83	
Tracy	91	1,206.63	
Vallejo	16811	224,787.42	1,737.20
Ventura	978	10,794.33	
Watsonville	528	6,754.29	
West Glendale	60	388.35	203.89
Wildasin	60	896.85	
Wingfoot	181	1,922.41	
Total	153,870	$1,811,173.68	$49,554.95

[fol. 279] EXHIBIT No. 41

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

MOVEMENT OF WHEAT AND WHEAT FLOUR FROM MONTANA TO CALIFORNIA JUNCTION—PORTLAND, OREGON

Year 1955

Destination	Tons	Great Northern Revenue	S.P.&S. Revenue
Atascadero	40	$ 582.89	
Bakersfield	201	2,485.55	
Calexico	3307	33,214.79	
Culver City	150	1,599.54	
Eureka	846	9,392.79	
Fresno	1929	24,116.11	
Glendale	30	323.81	
Hanford	304	3,746.88	
Lodi	3137	41,426.39	
Los Angeles	20469	170,348.38	$40,760.47
Montebello	180	2,897.64	
North Hollywood	1737	18,171.85	
Oakland	2348	15,681.24	4,983.80
Pasadena	30	321.39	
Puente	898	9,692.10	
Sacramento	6750	93,016.93	1,574.70
San Bernardino	50	239.18	155.84
San Francisco	94	1,230.03	
San Luis Obispo	357	4,118.12	
Santa Barbara	273	2,997.82	
Santa Cruz	653	8,359.25	
Santa Rosa	40	254.23	139.05
San Ysidro	110	863.22	
Stockton	20	266.09	
Tracy	91	1,206.63	
Vallejo	5673	75,138.32	1,737.20
Ventura	942	10,307.09	
Watsonville	402	5,198.49	
West Glendale	60	388.35	203.89
Total	51,121	$537,585.10	$49,554.95

[fol. 280]

EXHIBIT No. 42

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

MOVEMENT OF WHEAT AND WHEAT FLOUR FROM MONTANA TO CALIFORNIA JUNCTION—CHEMULT, OREGON

Year 1955

Destination	Tons	Great Northern Revenue
Bakersfield	185	$ 2,194.26
Beverly Hills	5471	55,984.58
Culver City	240	2,464.64
Eureka	114	1,491.29
Fresno	759	9,157.56
Los Angeles	9845	115,425.90
Montebello	1472	7,018.58
North Hollywood	240	3,064.03
Norwalk	30	410.66
Oakland	344	4,809.34
Porterville	20	306.63
Sacramento	972	14,661.15
San Francisco	1610	20,565.61
San Jose	60	804.89
Santa Cruz	373	4,859.62
Stockton	35	544.42
Vallejo	10969	147,746.01
Watsonville	96	1,153.34
Wingfoot	181	1,922.41
Total	33,016	$394,584.92

[fol. 281]

EXHIBIT No. 43

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

MOVEMENT OF WHEAT AND WHEAT FLOUR FROM MONTANA TO CALIFORNIA JUNCTION—BIEBER, CALIFORNIA

Year 1955

Destination	Tons	Great Northern Revenue
Bakersfield	3271	$ 46,971.94
Beverly Hills	40	624.14
Corcoran	30	449.17
Fresno	1237	18,560.51
Fruitvale	90	1,458.44
Hanford	30	448.71
Lodi	759	12,397.69
Los Angeles	41317	545,658.97
Oakland	1053	18,509.11
Porterville	1934	28,341.31
Placentia	30	394.60
Sacramento	1475	26,279.24
San Bernardino	260	3,470.50
San Diego	4678	59,909.43
San Francisco	2419	43,206.04
San Jose	20	334.84
San Leandro	247	3,984.12
Stockton	176	3,368.32
Ventura	36	487.24
Watsonville	30	402.46
Wildasin	60	896.85
Total	59,192	$816,156.63

[fol. 282]

EXHIBIT No. 44

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

MOVEMENT OF WHEAT AND WHEAT FLOUR FROM MONTANA TO CALIFORNIA JUNCTION—BUTTE, MONTANA

Year 1955

Destination	Tons	Great Northern Revenue
Los Angeles	10,160	$59,702.63
Sacramento	212	1,241.31
Vallejo	169	1,903.09
Total	10,541	$62,847.03

[fol. 283]

EXHIBIT No. 45

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

DISTRIBUTION OF PRESTON SHAFFER TONNAGE TO CALIFORNIA IN SAME RATIO AS SHOWN BY EXHIBIT NO. 40, AND SHOWING REVENUE GREAT NORTHERN WOULD SECURE UNDER JOINT THROUGH RATES VIA GREAT NORTHERN, SPOKANE, UNION PACIFIC TO PORTLAND, COMPARED TO REVENUE WE NOW SECURE VIA GREAT NORTHERN, PORTLAND, SOUTHERN PACIFIC.

(Rates used Include Ex Parte 206 Increase)

To California Points	Great Northern revenue out of through joint rates via G.N.-Portland-S.P.	Great Northern revenue via G.N., Spokane, U.P., out of through rates to Portland
Sacramento	$ 36,74[illegible]0	$ 21,190.00
Lodi Vallejo	$ 79,989.00	$ 46,901.00
Eureka Fruitvale Oakland San Francisco Santa Rosa Stockton Tracy	$ 34,965.00	$ 20,849.00
San Jose San Leandro	$ 1,141.00	$ 692.00
Fresno Santa Cruz Watsonville	$ 19,912.00	$ 12,509.00
Corcoran Hanford	$ 1,062.00	$ 692.00

To California Points	Great Northern revenue out of through joint rates via G.N. Portland-S.P.	Great Northern revenue via G.N., Spokane, U.P., out of through rates to Portland
Porterville	$ 6,810.00	$ 4,520.00
Atascadero) Bakersfield) San Luis Obispo)	$ 13,349.00	$ 9,032.00
[fol. 284] Santa Barbara	$ 964.00	$ 692.00
Beverly Hills) Culver City) Glendale) Los Angeles) North Hollywood) Norwalk) Pasadena) Puente) Ventura) West Glendale) Wingfoot)	$282,988.00	$207,411.00
San Bernardino	$ 925.00	$ 692.00
Montebello) Wildasin)	$ 4,897.00	$ 3,828.00
Calexico) San Diego) San Ysidro)	$ 23,030.00	$ 18,414.00
Total	$506,774.00	$347,422.00

[fol. 285] EXHIBIT No. 46

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

POINTS ON GREAT NORTHERN RAILWAY IN THE MONTANA TRIANGLE SHELBY TO HAVRE TO GREAT FALLS THAT SHIPPED 500,000 BUSHELS OR MORE FOR TWELVE MONTH PERIOD JULY, 1955 TO JUNE, 1956, INCLUSIVE, TOGETHER WITH GREAT NORTHERN MILEAGE TO PORTLAND AND SPOKANE, AND SHOWING AN AVERAGE MILEAGE FROM THE MONTANA TRIANGLE

From	To Portland, Ore. Miles	To Spokane, Wash. Miles	Number of Bushels Shipped
Havre, Mont.	1043	530	2,080,733
Box Elder, "	1068	555	728,200
Big Sandy, "	1079	566	1,751,200
Chappelle, "	1095	582	716,033
Ft. Benton, "	1082	569	1,148,333
Carter, "	1067	554	1,190,900
Great Falls, "	1038	525	2,969,167
Dutton, "	1001	488	1,428,533
Brady, "	983	470	1,213,467
Conrad, "	970	457	1,547,633
Ledger, "	959	446	761,167
Kremlin, "	1024	511	621,566
Gildford, "	1014	501	765,600
Hingham, "	1008	495	1,047,933
Rudyard, "	1002	489	734,600
Inverness, "	996	483	760,300
Joplin, "	992	479	1,207,300
Chester, "	982	469	1,592,733
Lothair, "	969	456	574,633
Shelby, "	939	426	2,813,933
Average	1016 miles	503 miles	

Tariff Authority: G.N. Ry. Distance Table 400-C, I.C.C. No. A-6710

[fol. 286]

EXHIBIT No. 47

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

LIST OF FLOUR MILLS IN MONTANA

Station	Name of Mill	Milling Capacity Number of Hundred Weights each 24 Hours	
		As shown in Northwestern Miller for 1953	As reported by G.N. representatives as of December, 1956
Belgrade	Montana Flour Mills	—	450
Billings	Russell-Miller Milling Co.	2900	2700
Bozeman	Montana Flour Mills	1300	1275
Great Falls	Montana Flour Mills	3000	3100
Great Falls	General Mills, Inc.	2800	3200
Harlowton	Montana Flour Mills	2000	1800
Lewistown	Montana Flour Mills	1500	1400
Livingston	Teslow, Inc.	400	400
Sidney	Russell-Miller Milling Co.	1300	400
Townsend	Montana Flour Mills	—	400
Townsend	Centennial Mills	—	400

[fol. 287]

EXHIBIT No. 48

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

LIST OF FLOUR MILLS IN IDAHO

Station	Name of Mill	Milling Capacity Number of Hundred Weights each 24 Hours	
		As shown in Northwestern Miller for 1953	As reported by G.N. representatives as of December, 1956
Burley	Burley Flour Mills	1450	1600
Caldwell	Colorado Milling & Elevator Co.	800	800
Lewiston	Prairie Flour Mill Co.	400	400
Malad City	Crowther Bros. Milling Co.	250	600
Nampa	Colorado Milling & Elevator Co.	400	400
St. Anthony	St. Anthony Flour Mills	600	600
Twin Falls	Twin Falls Flour Mills	1450	1600
Weiser	Colorado Milling & Elevator Co.	900	900

[fol. 288]

EXHIBIT No. 49

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

LIST OF FLOUR MILLS IN OREGON

Station	Name of Mill	Milling Capacity Number of Hundred Weights each 24 Hours	
		As shown in Northwestern Miller for 1953	As reported by G.N. representative as of December, 1956
Astoria	Globe Mills	6000	6400
Athena	Preston Shaffer Milling Co.	1500	1500
Freewater	Preston Shaffer Milling Co.	2300	2300
Helix	Helix Milling Co.	1250	1250
Island City	Pioneer Flouring Mill Co.	400	450
Pendleton	Iglehart Brothers—Division of General Foods Corporation	2400	2300
Portland	Crown Mills	5000	5000
Portland	Terminal Flour Mills Co.	3000	3500
The Dalles	Sunshine Biscuits, Inc.—Milling Division	5000	5000

[fol. 289]

EXHIBIT No. 50

I.C.C. Docket No. 32015

GREAT NORTHERN RAILWAY COMPANY

LIST OF FLOUR MILLS IN WASHINGTON

Station	Name of Mill	Milling Capacity Number of Hundred Weights each 24 Hours	
		As shown in Northwestern Miller for 1953	As reported by G.N. representatives as of December, 1956
Cheney	National Biscuit Co.	2200	2000
Seattle	Fisher Flouring Mills Co.	15000	15000
Spokane	Centennial Flouring Mills Co.	4800	4800
Spokane	General Mills, Inc.— Sperry Division	4900	4600
Spokane	Spokane Flour Mills Co.	3000	3000
Tacoma	General Mills, Inc.— Sperry Division	8400	10000
Waitsburg	Preston Shaffer Milling Co.	1500	1500
Wenatchee	Centennial Flouring Mills Co.	1200	1500

[fol. 291]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 32015

PRESTON-SHAFFER MILLING CO., Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, et al., Defendants.

COMPLAINANT'S REPLY TO DEFENDANT GREAT NORTHERN'S VERIFIED STATEMENT—Filed March 19, 1957

Walter C. Mikkelsen, having been duly sworn as a witness in the above-entitled cause at the hearing held before Examiner Edward L. Boisseree, at Seattle, Washington, on the 3rd day of October, 1956, now hereby further testifies under oath by way of reply to "Defendant's Further Presentation Under Verified Statements and Exhibits", as follows:

I am the Manager of the Grain Department and a Vice-President of complainant company, and also perform the functions of a traffic manager for complainant, as set forth at page 8 of the transcript of the hearing above referred to, where my experience and qualifications are more fully set forth.

The main purpose of defendant Great Northern's verified statement appears to be to show how much money it would lose if required to establish the joint rates herein [fol. 292] sought by complainant over the route of the Great Northern from points in Montana to Spokane, the Union Pacific to points in Oregon south of Portland, and to California, in lieu of the combination of rates on Portland which now apply.

The Great Northern "figures" that in 1955-56, complainant shipped 39,660 tons of flour to California made from Montana hard spring wheat. While I have no desire to minimize this, for the sake of keeping the record straight,

it would be more nearly correct to say that the amount for that crop year was 31,168 tons, which also includes some hard spring wheat originated on the Milwaukee Railroad.

Taking the 39,660 tons, the Great Northern concludes that it would receive $53,491 less revenue if the traffic moves over the route via complainant's mills at the joint rates than it would if it moved over the Great Northern to Portland and Southern Pacific beyond.

This overlooks the fact that the Great Northern has joint rates to California via Chemult and Bieber junctions, and that there is no reason why complainant's traffic should not move that way if the Great Northern desires to make the joint rates effective over those routes.

The importance of the traffic moving over the routes of the Great Northern via the junctions last named is shown by Exhibits 41, 42, 43 and 44, from which it appears that 33,016 tons moved via Chemult Junction (Ex. 42) and 59,192 tons via Bieber Junction (Ex. 43), which together constitute 59.9% of the total movement as shown by Exhibit 40. In view of these facts, the Great Northern might [fol. 293] well earn as much revenue if the traffic moved at the joint rates via Chemult and Bieber as it would earn if it moved via Portland and the Southern Pacific.

It appears that the Great Northern would lose very little, if any, revenue by the establishment of the joint rates. As shown by the oral testimony given at the hearing, the Great Northern is now generally getting the haul only to Spokane, because complainant has thus far been able to reach the California market through proper selection of billing authorized by the tariffs (Transcript 45-50).

Beginning at page 6 of the Statement, the Great Northern attempts to show what it would lose if certain other mills were granted joint rates, and the belief is expressed that these mills "will market in California if joint through rates are established which would permit transit at their milling points."

The mill at Helix was granted joint rates to Portland by the Commission, and was evidently not interested in the California market because it did not request joint rates to California. The fact is that this mill manufactures mainly export flour.

The mill at Island City, Oregon, is located on a branch of the Union Pacific in eastern Oregon, which makes soft wheat flour for local consumption and for export. It is required to pay an out-of-line charge of 11 cents per cwt on wheat from Great Northern points in Montana, and therefore could not compete in the California market in any event on flour made from Montana hard spring wheat.

The mill at Pendleton at present is known to be a soft-wheat cake mill. If it should desire to adapt its milling equipment so as to make flour for the California market from Montana hard spring wheat it would be in the same [fol. 294] position as complainant's mills. It is served by the Union Pacific and has joint rates to Portland, the same as complainant's mills.

The same applies to the mill at The Dalles, and the mill at Cheney is in a similar position, but these mills are owned by Sunshine Biscuits, Inc. and National Biscuit Company, respectively, which are manufacturers of crackers, cookies, biscuits and other pastry goods, requiring little, if any, Montana hard spring wheat. Furthermore, it is believed that these mills use all of their production for their own bakery purposes.

In view of these facts, it hardly seems necessary to consider the conclusions reached from the discussion. They are based on the assumption that these mills will change the character of their milling operations, use the same wheat blends as complainant's mills, produce the same qualities of bread flour, develop the California market, require the same percentage of Montana hard spring wheat as complainant, and that it would all originate on the Great Northern.

The Great Northern goes even farther and attempts to show what it would lose if these mills would take away the long-established business of the mills located on its lines. This is so extremely far-fetched that it requires no reply and any idea that they could successfully replace the established brands of bread flour now produced for the California market is obviously improbable.

[fol. 295] In addition to the mills already mentioned, defendant in Exhibits 47 to 50 lists the mills in the northwestern states, with the implication that all of these are in the same position as complainant's mills.

Exhibit 47 lists the mills in Montana, including 6 belonging to Montana Flour Mills, the largest of which is at Great Falls, for which the Commission required the establishment of transit over the route via Butte, which is therefore in a position to serve the California market at the joint rates. The other mill at Great Falls, owned by General Mills, is in the same position. The mill at Billings would involve a substantial out-of-line or back-haul on wheat from the triangle territory, and is therefore not in the same position as complainant's mills, and the mill at Sidney is in the eastern part of Montana from which the rates to Minneapolis and Duluth are substantially lower.

Exhibit 48 lists mills in southern Idaho which are so located off the main route of the Union Pacific through Ogden that the charges for the out-of-line haul for wheat originating on the Great Northern in Montana would be prohibitive so far as the California market is concerned.

Exhibit 49 lists mills in Oregon, including two of complainant's mills. Reference has already been made to the mills at Helix, Island City, Pendleton and The Dalles. The mill at Astoria is at the mouth of the Columbia river about 100 miles from Portland, thus involving a sub-
[fol. 296] stantial out-of-line haul for rail shipments to California, and it is my understanding that this mill is engaged almost entirely in the export market. The mills at Portland are, of course, in a position to do business in California on the joint rates sought by complainant.

Exhibit 50 lists the mills in the state of Washington. Aside from complainant's mill at Waitsburg, and the mill at Cheney, earlier referred to, all of the mills listed have available the joint rates sought by complainant.

Walter C. Mikkelsen

Certificate of Service (omitted in printing).

[fol. 298]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PRESTON-SHAFFER MILLING CO., Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, et al., Defendants.

SUPPLEMENTAL VERIFIED STATEMENT
ON BEHALF OF
COMPLAINANT AND CENTENNIAL MILLS, INC.—
Filed June 3, 1957

Preliminary Statement

After the record in this case was completed, but before the briefs were filed, Centennial Mills, Inc. purchased complainant's business, including brands and trademarks, and the mill at Milton-Freewater, Oregon, and thus became the successor in interest and has been substituted as complainant in this proceeding. In view of this fact, the parties recognized that it would be necessary to offer some additional evidence, and therefore agreed that this should be presented by filing verified statements, which was approved by the Commission. Pursuant thereto complainant and Centennial Mills, Inc. hereby submit the following additional evidence.

[fol. 299]

ADDITIONAL TESTIMONY OF PHILIP I. WELK

Philip I. Welk, having been duly sworn as a witness in the above-entitled cause at the hearing before Examiner Edward L. Boisseree, at Seattle, Washington, on the 3rd day of October, 1956, now hereby further testifies under oath as follows:

I am President of Preston-Shaffer Milling Co., the original complainant herein, and testified at the hearing of of this case as set forth in the transcript beginning at page 129, where my experience in the milling business and my connections with complainant are fully set forth.

As the result of negotiations carried on in recent months, my company sold its business, including brands and trade-

marks, and the flour mill at Milton-Freewater, Oregon, to Centennial Mills, Inc., and agreed that its mills at Waitsburg, Washington, and Athena, Oregon, would no longer be operated as flour mills or engage in the manufacture of flour, and these mills, therefore, have no further interest in this matter. The contract of sale was executed on the 22nd day of April, 1957, and provided that Centennial Mills, Inc. should take over complainant's business on the 1st day of May, 1957, which has accordingly been done.

The mill at Milton-Freewater is the largest, most modern and best equipped of complainant's mills, with a capacity of 2400 cwt of flour per day, and has been the main reliance for the production of the bread flour heretofore sold and disposed of by complainant in the California market. This mill is now engaged almost exclusively in the milling of bread flour for bakery use by the large bakery concerns in the important cities in California.

[fol. 300] There is a strong tendency in the milling business to ship flour in railroad cars in bulk and some of the large bakeries in California are rapidly converting to the use of bulk flour rather than as formerly in carton or paper bags. The use of the air-slide car for the movement of bulk flour in shipments of 90,000 pounds per car is rapidly developing.

Recognizing that this method of handling flour will become common practice because it is more economical, complainant recently installed equipment and facilities at considerable expense at its plant at Milton-Freewater to load cars for bulk shipments. This consists of a battery of four steel tanks into which the flour is placed. From these tanks the flour is sent through sifters and entoleters for aeration to avoid condensation in the cars, and thence over an automatic scale from which the flour is blown directly into the car. The mill is thus ready to start shipping flour in bulk on short notice as the large bakeries become equipped to handle and take delivery in air-slide cars.

The mill at Milton-Freewater is now taking the tonnage previously shipped to California that complainant had at all three of its mills, thereby creating efficiency of operation and making this mill almost exclusive for movement to the California bakery trade, which makes it absolutely dependent upon originating hard spring wheat and the

strongest possible winter wheat on the Great Northern in Montana.

As I previously testified (Transcript p. 134), the Western Milling Company was a corporation that previously owned and operated the mill at Pendleton, Oregon. When that mill was destroyed by fire, all of the operations were consolidated in the Preston-Shaffer Milling Co. Since [fol. 301] then, the Western Milling Company has been operated as a division of complainant. As such it has been handling complainant's sales of flour and has developed and established well-known brands of flour and trademarks, particularly with customers in California and Oregon, and that the trade and good will thus developed constitute an important asset of complainant's business.

Philip I. Welk

[fol. 302]

VERIFIED STATEMENT OF MORITZ MILBURN

State of Washington,
County of King, ss.:

Moritz Milburn, being first duly sworn, upon his oath deposes and says:

I am President of Centennial Mills, Inc., which is a corporation organized and existing under the laws of the State of Washington, having its principal place of business in the City of Seattle, Washington.

The company and its predecessor, Centennial Flouring Mills Company, have been engaged in the grain and milling business in the Pacific Northwest for many years. At the present time it owns and operates a flour mill at Spokane, Washington, with a daily capacity of 4600 cwt of flour per day; at Wenatchee, Washington, with a capacity of 1600 cwt; and at Portland, Oregon, with a capacity of 5000 cwt, making a total capacity of 11,200 cwt of flour per day.

As a result of negotiations carried on in recent months, Centennial Mills, Inc. purchased complainant's milling business, including its brands and trademarks, and the mill at Milton-Freewater, Oregon, which has a capacity of 2400 cwt of flour per day, and has been operating said mill since May 1, 1957.

Centennial Mills, Inc. is the successor in interest to complainant and its business and intends to carry on said business in the same manner as it has heretofore been carried on by complainant, except that this does not include the mills at Waitsburg, Washington, and Athena, Oregon, which are to be abandoned as flour mills and therefore have no further interest in this matter.

[fol. 303] Complainant's sales of flour have heretofore been handled by the Western Milling Company, through which well-known brands of flour and trademarks have been established and customers and good-will developed, particularly in the States of California and Oregon, and it is the intention of Centennial Mills, Inc. to continue to carry on and promote its business through the Western Milling Company, as a division of Centennial Mills, Inc. The trade relationships and good-will thus created and established by complainant were an important consideration in the purchase of said business by Centennial Mills, Inc.

Another important consideration in buying the mill at Milton-Freewater was that it has recently been equipped to handle bulk shipments of flour, as testified by witness Welk. None of the other plants of Centennial Mills, Inc. is equipped to handle such shipments, and this will enable it to supply the large bakeries in California which will require shipments to be made in that manner.

It is our intention to carry on the business heretofore conducted and carried on by complainant, and to concentrate as much as possible of the business heretofore carried on at the other mills, at the Milton-Freewater mill. We therefore wish to adopt the testimony and evidence heretofore presented by complainant at the hearing of this case and in the Reply to the Verified Statement of the Great Northern.

Moritz Milburn

Subscribed and sworn to before me this 24th day of May, 1957.

Herbert W. Yandle, Notary Public in and for the State of Washington, residing at Seattle.

(Notarial Seal)

[fol. 307]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 32015

PRESTON-SHAFFER MILLING CO.

vs.

GREAT NORTHERN RAILWAY COMPANY, et al.

SUPPLEMENTAL VERIFIED STATEMENT ON BEHALF OF DEFENDANT, GREAT NORTHERN RAILWAY COMPANY—
June 14, 1957

Comes Now the Great Northern Railway Company, pursuant to the authority granted by the Commission in its letter of May 22, 1957, and supplements the verified statements heretofore filed by it, as follows:

[fol. 308] FURTHER VERIFIED STATEMENT OF ERNEST F. McGUIRE

State of Washington)
ss.
County of King)

Ernest F. McGuire, being first duly sworn on oath deposes and says:

The complainant, Centennial Mills, Inc., in addition to its newly acquired Preston-Shaffer plant at Milton-Freewater, Oregon, has flour mills located at Spokane and Wenatchee, Washington, and Portland, Oregon, with a combined capacity of 11,200 hundredweights of flour per day, which should be contrasted with the capacity of its Preston-Shaffer plant of 2,400 hundredweights per day. The mills at Spokane, Wenatchee and Portland are each located on through routes to California from Montana, and the rates here sought by complainant for its Milton-Freewater mill,

that will short haul the Great Northern, already apply via the routes serving these three mills of complainant.

Each of these mills now have through routes to California, as follows:

Spokane:	GN-Bieber-WP and connections.
	GN-Chemault-SP.
	GN-Portland-SP.
	GN-Spokane-SP&S-Portland-SP.
Wenatchee:	GN-Portland-SP.
	GN-Bieber-WP and connections.

[fol. 309]

Portland:	GN-Spokane-SP&S-Portland-SP.
	GN-Portland-SP.
	GN-Bieber-WP and connections.

The short tariff mileages via these routes through the transit stations via Spokane, Wenatchee and Portland are shown on my Exhibit 1 hereto attached and compared to the mileages of the routes sought by complainant.

In my Exhibit 2 hereto attached, I have shown the Great Northern participation in the movements via present short tariff routes, as compared to the Great Northern participation under the routes sought by the complainant.

Under present routes the Great Northern now transports this Montana grain or grain products for as much as 74 per cent of the distance to San Francisco (GN, Bieber, WP route), and 58 per cent of the distance to Los Angeles (GN, Bieber, WP route). On movements under present routes which give the Great Northern its smallest participation in the transportation (GN, Spokane, SP&S, Portland, SP route), the Great Northern is the carrier for 51.4 per cent of the mileage to San Francisco, and 43.6 per cent to Los Angeles. The Great Northern participation in each instance should be contrasted with the Great Northern participation in the movement if it is compelled to open the routes sought by the complainant. On the same hauls via these new routes, the Great Northern participation in the transportation to San Francisco would be 28.6 per cent of

[fol. 310] the distance to San Francisco, and 23.3 per cent of the distance to Los Angeles.

Ernest F. McGuire

Subscribed and sworn to before me this 12th day of June, 1957.

Janice Goetz, Notary Public in and for the State of Washington, residing at Seattle. My Commission Expires October 7, 1959.

[fol. 311] VERIFIED STATEMENT OF F. W. FULLER

State of Washington)
ss.
County of King)

F. W. Fuller, being first duly sworn on oath deposes and says:

Q. Mr. Fuller, you have previously testified in this proceeding?

A. Yes.

Q. You testified your company, the Fisher Flouring Mills Company, has a flour mill at Seattle, Washington with a flour milling capacity of 15,000 hundredweights per day, and your company sells a little more than 40 per cent of this capacity in California. Has your company sold flour in California over a period of time?

A. Yes, for at least 40 years.

Q. Has your company found, and does it now find the market in California to be competitive, or relatively free from competition from other mills?

A. The market is highly competitive at all times.

Q. Where is this competition from?

A. It originates from;

(1) Southwestern mills located in Kansas, Nebraska, Oklahoma and the Panhandle of Texas,

(2) Mills in Southern Idaho, Northern Utah, commonly referred to as "Intermountain Group,"

(3) Wyoming mills,

(4) Montana mills,

(5) California mills grinding wheat originating in California, Southern Idaho, Northern Utah, Montana, also Oregon, Washington and Northern Idaho,

[fol. 312] (6) North Pacific Coast Mills located in Oregon, Washington and Northern Idaho, including the plants of the complainant.

Q. Are you familiar with the capacity of the mills of the Pacific Northwest and such other mills that are located on the present through routes to California from Montana, and which are in a position to supply this California market with flour milled from Montana wheat?

A. Yes.

Q. Do you know whether or not these mills are operating to capacity?

A. Yes. These mills report periodically their actual production to an Association, and I have access to the Association's statistics showing the actual production of these mills. For the ten-month period beginning July 1, 1956 and ending April 30, 1957, the percentage of actual running time compared to their capacities has been as follows:

Date	Port Mills in Oregon and Washington	Interior Mills in Northern Idaho & Washington	Interior Mills in Oregon	Mills in Southern Idaho & Northern Utah	Mills in California
	%	%	%	%	%
7-56	81.8	68.2	104.9	88.0	94.4
8-56	85.7	71.0	80.5	103.5	102.7
9-56	92.9	82.7	94.3	*105.8	98.4
10-56	87.8	76.0	92.6	* 92.5	97.8
11-56	92.3	78.3	81.8	* 84.5	97.3
12-56	88.0	71.8	83.5	* 90.6	94.4
1-57	96.8	70.9	95.9	* 95.4	104.6
2-57	90.2	63.9	88.1	* 96.4	96.1
3-57	82.4	65.8	80.9	* 98.6	96.3
4-57	75.8	57.3	73.4	* 87.1	85.7
1955-56 crop yr.	80.0	66.9	84.1	94.4	103.7

* Beginning with September reports, figures thus marked "*", include production of some western Montana mills.

Q. Complainant testified its Milton-Freewater mill has a capacity of 2400 hundredweights per day. Would the [fol. 313] present idle capacity of the other mills in the Pacific Northwest located on these through routes from Montana to California be sufficient to satisfy the present and foreseeable future demands of the California market should complainant's Milton-Freewater mill for any reason be unable to sell any of its capacity in California?

A. Yes, the production of complainant's mill involved in this complaint is included in the third column of the percentages just quoted, and the comparison of that column of figures with the percentages of other Pacific Northwest mills shown in the other columns, clearly indicates there is sufficient idle capacity in these other mills (particularly in Columns 1 and 2) to supply the California markets.

Q. Have you and are you trying to increase your sales in California?

A. Yes, we would like very much to increase our sales in California, and we have been and are now trying to accomplish this.

Q. Have you been successful?

A. No, because of the competitive factors just related.

Q. Your mill buys grain shipped from Great Northern stations in Montana. Do you find much competition in buying this grain?

A. Yes, competition is quite intense.

Q. Who are these competitors?

A. Mills and grain dealers located at Minneapolis, Great Falls, Spokane, Seattle, Tacoma, Longview, Vancouver, (Wash.), Portland and also Ogden, Utah as well as buyers in California.

Q. Is this true with respect to the Montana high protein spring wheat?

A. Yes, if anything, the competition for the purchase of this grain is more severe than for grains generally.

F. W. Fuller

Subscribed and sworn to before me this 12th day of June, 1957.

Janice Goetz, Notary Public in and for the State of Washington, residing at Seattle. My Commission Expires October 7, 1959.

[fol. 314] Certificate of Service (omitted in printing).

[fol. 315] EXHIBIT No. 1

I.C.C. Docket No. 32015

Witness: Ernest F. McGuire

RATES AND ROUTES AVAILABLE TO COMPLAINANTS SPOKANE, WASH., WENATCHEE, WASH. AND PORTLAND, ORE. MILLS WHEN TO DESTINATIONS IN CALIFORNIA AS COMPARED TO RATES AND ROUTES FROM AND TO SAME DESTINATIONS WITH TRANSIT AT MILTON-FREEWATER, ORE.

Commodity: Wheat, carloads.
From: Chester, Montana

Transit Station	Rate in cents per 100#	California Destination	Short Tariff Miles	Route
Spokane,	118½	San Francisco	1435.1	GN-Chemult-SP
Wn.	118½	Los Angeles	1808.1	" " "
Wenatchee,	118½	San Francisco	1701.0	GN-Portland-SP
Wn.	118½	Los Angeles	2074.0	" " "
Portland,	118½	San Francisco	1565.4	GN-Spokane-SP&S-SP
Ore.	118½	Los Angeles	1938.4	" " " "
Milton-	*149	San Francisco	1638.9	GN-Spokane-UP
Freewater,	°118½	" "		Portland-SP
Ore.	*177	Los Angeles	2011.9	GN-Spokane-UP
	°118½	" "		Portland-SP

Explanation of Reference Marks:
* Present Rates.
° Sought Rates.

Authority for Rates:

Agent W. R. Watson's ICC No. 888.
Agent J. P. Haynes' ICC No. 1577.

Authority for Distances:

GNRy. ICC No. A-6710
SP&S Ry. ICC No. 732
UP RR. ICC No. 5325
SPCo. ICC No. 4687

[fol. 316] EXHIBIT No. 2

I.C.C. Docket No. 32015

Witness: Ernest F. McGuire

STATEMENT SHOWING GREAT NORTHERN RAILWAY COMPANY LOSS OF HAUL ON CARLOADS OF WHEAT, FROM MONTANA TO CALIFORNIA, VIA ROUTES SOUGHT AS COMPARED TO EXISTING ROUTES

FROM: Chester, Montana

To:	Route	Through Miles	GN Miles	GN % of Haul
San Francisco	GN-Spokane-UP-Portland-SP	•1638.9	468.6	28.6
	GN-Bieber-WP	1521.3	1127.5	74.1
	GN-Portland-SP	1701.0	981.7	57.7
	GN-Chemult-SP	1435.1	959.8	66.9
	GN-Spokane-SP&S†-Portland-SP	1565.4	°846.1	54.1
Los Angeles	GN-Spokane-UP-Portland-SP	•2011.9	468.6	23.3
	GN-Bieber-WP-Stockton-ATSF	1943.5	1127.5	58.0
	GN-Portland-SP	2074.0	981.7	47.3
	GN-Chemult-SP	1808.1	959.8	53.1
	GN-Spokane-SP&S-Portland-SP	1938.4	°846.1	43.6

Authority for Distances:

GNRy ICC No. A-6710
SP&S Ry ICC No. 732
UP RR ICC No. 5325
SPCo. ICC No. 4687
WP RR ICC No. 490
AT&SF Ry. ICC No. 14399

Explanation of Reference Marks:
• Distance computed via Milton-Freewater.
° GN-SP&S distance combined.
† SP&S owned 50% by GN, and SP&S part of GN for rate purposes.

INTERSTATE COMMERCE COMMISSION

No. 32015

PRESTON-SHAFFER MILLING CO.[1]

v.

GREAT NORTHERN RAILWAY COMPANY et al.

Decided .....

1. Rates on wheat and wheat products, in carloads, from origins on the lines of the Great Northern Railway Company in Montana to destinations in Oregon south of Portland and in California over routes through Milton-Freewater, Oreg., not shown to be unreasonable or unduly prejudicial.

2. Through routes and joint rates on wheat and wheat products, in carloads, from origins on the lines of the Great Northern Railway Company to destinations in Oregon south of Portland and in California through Milton-Freewater, Oreg., for transit found not shown to be necessary or desirable in the public interest.

Complaint dismissed.

S. J. Wettrick for the complainant.

R. Paul Tjossem and Robert F. Garing for the defendants.

REPORT PROPOSED BY EDWARD L. BOISSEREE, EXAMINER

Complainant corporation alleges by complaint filed June 19, 1956, that the combination rates[2] applicable on wheat

[1] As described in the report, Centennial Mills, Inc., Seattle, Wash., is successor in interest to the indicated complainant.

[2] Rates are stated in amounts per 100 pounds and are those in effect October 1, 1956.

and wheat products, in carloads, from stations on the defendant Great Northern Railway Company in Montana to destinations in Oregon south of Portland and in California over the route of the Great Northern[3] to Spokane, Wash., [fol. 318] Union Pacific to Portland, and connections beyond, with transit at Waitsburg, Wash., Milton-Freewater and Athena, Oreg., are unreasonable and unduly prejudicial. The Commission is asked to prescribe reasonable, nonprejudicial joint rates for the future and, if necessary, establish through routes under the provisions of section 15(3) and (4) of the act.

When the complaint was filed, the complainant owned and operated flour mills and adjoining elevators at Waitsburg, Milton-Freewater and Athena. Evidence was submitted by the complainant at the initial hearing, in October of 1956, but the defendant Great Northern, the only defendant to appear in opposition to the complaint, was granted an extension of time to March 1, 1957, to complete preparation of its evidence in reply. Complainant was authorized to file evidence in rebuttal by March 20, 1957. By stipulation this further presentation was submitted in the form of verified statements. Subsequent to the receipt of this further evidence but prior to the filing of briefs the parties requested additional time to make a supplemental showing as to the current ownership of the indicated flour mills. Verified statements were received from the parties in June and briefs were filed July 15, 1957.

The record as now constituted shows that the complainant corporation sold its flour business and the flour mill at Milton-Freewater to the Centennial Mills, Inc., of Seattle, Wash., in April 1957 and that the latter company has been operating the mill since May 1 of this year. Centennial Mills, Inc., also owns and operates flour mills at Spokane,

[3] The names of the defendants and other railroads with the abbreviations used herein are as follows: The Great Northern Company, Great Northern; Union Pacific Railroad Company, Union Pacific; Southern Pacific Company, Southern Pacific; The Atchison, Topeka and Santa Fe Railway Company, Santa Fe; the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Milwaukee; and The Northern Pacific Railway Company, Northern Pacific.

and Wenatchee, Wash., and Portland, Oreg., and its traffic [fol. 319] manager originally participated in this proceeding as a witness for the defendant Great Northern. Because of its change in interest, this company now adopts the testimony of the title complainant and asks that it be substituted as complainant; and that the prayer of the complaint be granted with respect to rates applicable over routes via Milton-Freewater. The mills at Waitsburg and Athena have ceased operations as flour mills and allegations in the complaint with respect to these mills will not be further considered. The defendants have no objection to the substitution of Centennial Mills, Inc., as complainant and that term as used subsequently herein will have reference only to this company.

The mill at Milton-Freewater is located in northwestern Oregon and is served by the Union Pacific and Northern Pacific. It has a capacity of 2,400 hundred weight of flour per day. Since about 1947 this mill has been used largely for the milling of flour for the commercial bakeries of California. Prior to that time, the Preston-Shaffer Company supplied flour to the California bakeries from a mill that it owned and operated at Pendleton, Oreg. The latter mill was destroyed by fire in 1947 and the production of the bakery flour moved to the other mills which prior to that time were used generally for the production of family flour. Since 1925, with the development of the large bakeries and the trend toward commercial production of bread, the flour mills in the Pacific Northwest have been active in the California market. That State with its increasing population, particularly in the larger cities, and its deficit in the production of flour was a principal market for the Preston-Shaffer Company and other mills in the Pacific Northwest.

[fol. 320] Prior to World War II, the mills of the Preston-Shaffer Company that supplied flour to these bakeries obtained the necessary grain in Montana. The grain was milled in transit and the flour shipped to Portland under the joint rail rates applicable from the Montana origin to that destination. From Portland, the flour was shipped by water transportation to California destinations under the comparatively low coast-wise steamship rates. For

the period from 1938 to 1941, the rail-water rates from Montana to San Francisco and Los Angeles were lower than the all-rail rates from and to the same points. During World War II, the water service was discontinued but the water competitive port-to-port rail rates between Portland and California were continued in effect until September 1, 1947, when orders of this Commission withdrawing fourth section relief to maintain such rates became effective. At this point, the normal rail rates from Montana origins to California became effective. Over routes via Milton-Freewater, the normal rates from origins on the Great Northern are, as hereinafter described, the combination of the rate from origins to Portland with the rate applicable from that point to final destination. Such rates are somewhat higher than the joint rate applicable from the same origins to California over other routes.

Rates on wheat and wheat products from Montana origins to the Pacific Coast were originally prescribed by the Commission in *Grain and Grain Products*, 205 I.C.C. 301, 215 I.C.C. 83. From the Central Montana group including central and north central areas of the State, a rate of 39 cents was prescribed to North Pacific Coast terminals such as Portland. The present rate as a result of subsequently au- [fol. 321] thorized increases is 72 cents. That rate is applicable from Montana groups origins on the Great Northern to Portland via the route of the originating carrier to Spokane and the Union Pacific beyond. Transit is extended under that rate at complainant's mill at Milton-Freewater. On traffic destined to California as well as points in Oregon south of Portland, the joint rate from the same Montana origins is not applicable over the route just described and connections beyond Portland. On traffic from these Great Northern origins to San Francisco and Los Angeles, for example, the joint rate fixed in *Grain and Grain Products, supra*, was 65 cents and with the increases subsequently authorized is now $1.185. The joint rate was required to be published only over routes via designated Washington and Oregon gateways and via Butte, Mont. On grain stopped at complainant's Milton-Freewater mill and later moved through Portland to destinations beyond to the south in Oregon or in California the applicable rate from

central Montana origins on the Great Northern is a combination of the 72 cent rate to Portland and the published rate from the latter point to final destination. To San Francisco the rate from Portland is 77 cents so the total rate from the Great Northern origin in central Montana via Milton-Freewater is $1.49 or 30.5 cents more than the joint single-factor rate of $1.185 applicable over the other routes indicated.

In 1948, following the cancellation of the reduced rail port-to-port rates from Portland to the California destinations, the Preston-Shaffer Company sought an adjustment of rates through an appeal to the Great Northern to apply the joint rates over routes via its mills. Further negotiations were delayed pending a final decision in *General Mills Inc.* v. *Great Northern Ry. Co.*, 269 I.C.C. 457. In the indi- [fol. 322] cated proceeding decided December 19, 1947, the Great Northern's failure to establish transit provisions at Great Falls, Mont., in connection with the through rates on wheat and wheat products from Montana via routes through Butte, Mont., to destinations in California and Nevada was found to be unreasonable and unduly prejudicial. An appeal was taken by the Great Northern and the report of the Commission was sustained in *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921., 336 U. S. 933. Negotiations between the parties were resumed in May 1956 and the Great Northern advised the Preston-Shaffer Company that it would not join in the publication of the joint rate over the route sought. The present complaint was instituted as a result of such action.

From Montana origins located on the Milwaukee and Northern Pacific the joint rates are applicable over routes via complainant's mill at Milton-Freewater to the considered destinations. The following table compares the rates applicable from representative origins in central Montana on such railroads with those applicable from Chester on the Great Northern over routes of movement via Milton-Freewater and competitive transit points to San Francisco and Los Angeles.

[fol. 323]

From	To	Route	Transit Point	Rate
Chester, Mont.,	San Francisco) Los Angeles)	GN-Portland-SP	Seattle	$1.18½
Chester, Mont.,	San Francisco) Los Angeles)	GN-Butte-UP Ogden-UP/SP	Ogden	1.18½
Chester, Mont.,	San Francisco) Los Angeles)	GN-Spokane-UP-Portland-SP	Milton-Freewater "	1.49 1.77
Three Forks, Mont.,	San Francisco) Los Angeles)	NP-Portland-SP	Milton-Freewater "	1.18½ 1.18½
Great Falls, Mont.,	San Francisco) Los Angeles)	MILW-Spokane-UP-Portland-SP	Milton-Freewater "	1.18½ 1.18½

Abbreviations:—GN, Great Northern; SP, Southern Pacific; UP, Union Pacific; NP, Northern Pacific; MILW, Milwaukee.

To Oregon destinations south of Portland the situation is similar to that reflected in the above table. Joint rates are applicable to such points from Montana origins on the Northern Pacific and Milwaukee via complainant's mill at Milton-Freewater but higher combination rates are applicable from the Great Northern origins. The latter rates exceed the joint rates by amounts ranging from 7 cents on movements to Salem to 15.5 cents on movements to Klamath Falls.

At the time of the decision in *Grain and Grain Products, supra,* the joint rates did not apply from Montana origins to California destinations over routes through Butte, Mont., and Ogden, Utah, but only over the routes through Seattle and Portland in order to give the originating railroads their long haul. In that proceeding, the Commission required the establishment of the rates over the short routes through Butte. It did not order the establishment of the joint rates over the routes here sought. Subsequently, the Northern Pacific and the Milwaukee made the joint rates applicable via routes from Spokane to Portland via Milton-[fol. 324] Freewater. To Portland and other North Pacific Coast Terminals, the prescribed joint rates from Montana are effective over the route of the Great Northern to Spokane and Union Pacific beyond. But if the shipments move beyond Portland to the south, then the combination rates

over Portland is the applicable rate on any particular shipment.

The wheat produced in Washington, Oregon, and Idaho is not generally suitable for milling into bakery flour. In 1955, the soft white wheat used for pastry and cake flour amounted to about 90 percent of the total wheat production in those States. Montana, produces two kinds of wheat in volume. The hard winter wheat is generally used for family flour and the hard spring wheat grown most extensively in the central, north central and northeastern sections of Montana is primarily used to mill flour for commercial bakeries. The latter wheat has a higher protein content and a higher or stronger gluten quality which gives strength to the flour and enables it to withstand abuse and provide a large load volume. Many if not all of the flours contain blends of wheat but all of the bakery flour is milled from varying proportions of the hard spring wheat. In recent years, the commercial bakeries have insisted upon specification in their flour orders that make milling of the hard spring wheat essential.

Western millers obtain their supply of wheat for bakery flour generally from central and north central areas of Montana. The freight rates from these areas are lower to the Pacific Coast than to Minneapolis and Duluth, Minn., the eastern markets. The major portion of the spring wheat originates in areas adjacent to the lines of the Great [fol. 325] Northern, particularly in the north central area of Montana, although there is some production along the lines of Milwaukee. The six-year average wheat production in central Montana, 1950 to 1955, was some 46 million bushels about equally divided between winter and spring varieties of wheat. However, since 1950, there has been a substantial change. The spring wheat variety has declined from about 69 percent of the total harvested acreage in 1950 to only 27 percent in 1955, while the harvested acreage of winter wheat had a corresponding increase from 31 percent in 1950 to 73 percent in 1955. The production resulting from this harvested acreage shows a corresponding change. The spring wheat production declined from 26.3 million bushels in 1950 to 13.4 million bushels in 1955. Concurrently, the production of winter wheat increased from 12 million bushels in 1950 to 42 million in 1955.

The indicated shift in production was primarily due to the fact that winter wheat varieties are better able to withstand winter damage and, more importantly, the greater average yield of winter wheat more than offsets the higher prices paid for spring wheat. The defendant Great Northern originates about 79 percent of the hard spring wheat in the central and north central Montana. The remainder originates on the Milwaukee. In earlier years the Preston-Shaffer Company moved from 35 to 52 percent of its spring wheat requirements from origins on the Milwaukee. However, in recent years the production of the spring wheat has been largely concentrated in the more northerly areas in Montana adjacent to the lines of the Great Northern and that company was able during the 1955-56 crop year to pro- [fol. 326] cure only about 9 percent of its spring wheat requirements from Milwaukee origins. There has been certain instances, particularly during 1955, when the Pacific Northwest flour mills had to make spring wheat purchases in northeastern Montana where the freight rates to the Pacific Coast are higher than they are to the eastern markets. Joint rates from this section of Montana to California over routes via the Milton-Freewater mill are also sought by the instant complaint but in most years all western purchases of the spring wheat are made in the Central Montana group.

A continuing ability to sell flour in the California market is the real basis for this complaint. Preston-Shaffer's sales to California bakeries in the past five years averaged about 70 percent of its total output. California consumes substantially more flour than it produces while the reverse is true as to Washington, Oregon, Montana, and Utah. The annual deficit in California is about nine million hundred weight. Preston-Shaffer sales in California have ranged from 922,000 hundred weight in 1951 to 1,018,000 hundred weight in 1955. That company was able to continue its sale in California and even increase them slightly despite the indicated rate disparity through substitution or switching of billing. This practice, permitted by appropriate tariff provisions, enables the miller to take an allowance for the rail freight charges paid on the movement of the grain to the mill or transit point and ship the

milled product beyond the transit point at the remainder or balance of the rate applicable from the origin point of the grain to the destination point of the milled product. Billing of the Great Northern on grain originated at its Montana origins does not permit the movement of the flour or milled [fol. 327] product beyond Milton-Freewater at the balance of the joint rate applicable from origin to destinations in Oregon south of Portland and in California. On flour moving to such points from Milton-Freewater even though milled from grain originated at the Great Northern origins, the Preston-Shaffer Company would surrender billing covering grain originations at other points, such as on the Milwaukee or origins in Washington and Oregon where the company purchases white wheat, in order to move the milled product at the most favorable freight charges.

Flour movements to California points south to Stockton and San Jose from Milton-Freewater were limited by the amount of wheat originated by Preston-Shaffer at Milwaukee origins in Montana. On flour movements to northern California destinations the company surrendered billing on wheat moving inbound to the mill from Washington and Oregon destinations. As indicated, joint rates were applicable from these origins through Milton-Freewater. The Preston-Shaffer Company had encountered difficulty in making this substitution of billing on its outbound movements of flour to the indicated destinations because on increasing proportion of its wheat requirements came from origins on the Great Northern in Montana and as a result there was an insufficient amount of other billing to move the flour to California destinations at charges competitive with other mills. A further obvious complication is the disposition of the outbound tonnage represented by the inbound billing from the Great Northern origins. From July 1, 1955 to June 30, 1956, Preston-Shaffer Company purchased some 55 million pounds of wheat at Great Northern origins. On that tonnage, it used the billing on 37 million to move flour and mill feed to Portland and ad- [fol. 328] jacent points to which the joint rate was applicable. The billing on the remaining 18 million pounds was about equally divided between export shipments of flour and wheat through North Pacific ports.

On some shipments of flour and mill fee, the Preston-Shaffer Company was compelled to pay combination rates over Portland because of a lack of the necessary billing. These were restricted to movements to Oregon destinations where the difference between such rates and the joint rate was comparatively small. During the crop year 1955-56, it shipped some eight million pounds of flour and mill feed to southern Oregon destinations on which it paid approximately $6,000 in transportation charges more than would have been due if billing had been available to enable it to move the tonnage at the balance of the joint rate. No shipments were made to California destinations on which the combination rates over Portland were paid.

The subsequent change in ownership of the flour mill at Milton-Freewater, the abandonment of the other two mills, and the substitution of Centennial Mills, Inc., as complainant changes the situation somewhat. The present complainant has mills located on the Great Northern at Spokane and Wenatchee, Wash., and at Portland, Oreg., and the joint rates sought by the original complainant are applicable on wheat moving from Montana, Great Northern origins via such mills. Complainant pursues the objectives originally sought, however, because the Milton-Freewater mill is engaged almost exclusively in the milling of bread flour for the California bakeries and this mill is equipped to load cars for bulk shipment of flour. Complainant's other mills are not equipped to handle such shipments and this was assertedly an important consideration in buying the [fol. 329] mill from Preston-Shaffer. In any event, the fact that it has other mills which can ship to the California markets at the joint rates applicable from origin of the wheat is no reason, accordingly to complainant, for not providing the mill at Milton-Freewater with the same privilege.

Generally, it is the position of the complainant that through routes presently exist from Montana origins via the Great Northern to Spokane, Union Pacific to Portland, Santa Fe or Southern Pacific beyond and that application of the joint rates sought over such routes can be authorized under section 1 and 3 of the act. Complainant also submits

that the evidence of record warrants findings that such through routes and joint rates should be established under the provisions of section 15(3) and (4) of the act, and it ask the Commission to so find. The defendant Great Northern is of the view that through routes do not presently exist; that the gateway of Spokane is commercially closed to complainant's mill at Milton-Freewater on grain originating on its lines in Montana; and that the issues herein are necessarily restricted to the establishment of through routes and joint rates under sections 15(3) and (4). This carrier has continually refused to join in the establishment of joint rates beyond Portland over the routes sought because the movement of wheat from origins on its lines via such routes would materially reduce the length of its haul. Participation in routes and rates from origins in Montana on its lines to Portland via Milton-Freewater and to California destination via Butte were established by action of the Commission. The Great Northern strongly adheres to the policy of holding traffic it originates to a movement on its lines for the greatest possible segment of the total transportation service.

[fol. 330] It is contended by complainant that the existence of through routes from and to the considered areas are established by the fact that through routes and joint rates are maintained in connection with the Great Northern over all routes via Portland except over the one serving its Milton-Freewater mill; that such routes are presently in effect from Montana origins on the Milwaukee and Northern Pacific; and that through shipments have been made during 1955 and 1956 via the route of Great Northern to Spokane, Union Pacific to Portland, and Santa Fe or Southern Pacific beyond to destinations in southern Oregon.

As indicated by complainant, the existence or nonexistence of a through route is a factual question to be resolved upon the circumstances of the particular case. Recent proceedings before the Commission and the Courts have set the standard for the determination as to whether a through route exists. In *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U. S. 321, the Court stated at page 327:

> In considering the question of through routes under 15(4) we begin with our recent holdings and opinions

in *Thompson* v. *United States*, 343 U. S. 549, *United States* v. *Great Northern R. Co.*, 343 U. S. 562. We there emphasized the purpose of 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline "short-hauls" without faithful observance of restrictive conditions imposed by that section. At the same time we recognized that Commission action is not necessary to the creation of through routes. We pointed out that a through route is ordinarily a voluntary arrangement, express or implied, between connecting carriers, and that the existence of such an arrangement depends upon the circumstances of particular cases. We said in *Thompson* v. *United States, supra*, at 557, that "in short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering a through transportation service".

As stated by the Court, the test is whether there is a "holding out" express or implied by the participating carriers to perform the through service. Here the facts do not [fol. 331] show such a holding out by the Great Northern. There is, on the contrary, a course of action by that carrier that leads to an opposite conclusion. It refused to join in the application of the joint rates over such route initially and through the maintenance of the higher combination of rates attempted to deter the movement of any wheat tonnage over routes which would result in short hauls for it. Evidence submitted by complainant shows that Great Northern's traffic officials refused to accede to several requests to permit the movement of the wheat from origins on its line via complainant's mill at the joint rates applicable over other routes where the carrier retained its long haul. Compare *Chicago M. St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, —— I.C.C. —— decided May 10, 1957.

The indicated movement to southern Oregon destinations made by complainant at the combination rates does not show a holding out to afford through transportation to California or even to those particular destinations from the considered origins. That question was effectively settled in *Thompson* v. *United States*, 343, U. S. 548 and in *Denver*

& R. G. W. R. Co. v. Union P. Co., supra. At page 559 in the former decision, the Court stated, "Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha". While at page 329 in the latter, a limited movement of traffic at the higher combination rates was held to be insufficient to establish routes.

Complaint does not assail the lawfulness *per se* of the particular segments of the combination rates applicable from the Montana origins to Portland or from that point to destinations in southern Oregon and California. Those [fol. 332] rates were fixed by the Commission in *Grain and Grain Products, supra.* The failure to apply the joint rates over the routes in question is assailed as unlawful. In view of the conclusion that through routes do not exist it is necessary now to consider whether the record here warrants the establishment of through routes and the prescription of joint rates.

Section 15(3) of the act grants the authority to establish such routes and rates provided that after full hearing it shall be determined that they are deemed to be necessary or desirable in the public interest. Section 15(4) modifies the foregoing section in that it provides, that, except as provided in section 3 of the act and except where one of the carriers is a water line, the Commission may not require a railroad to embrace in such route or routes substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route or routes, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or unless the Commission finds that the through route is needed in order to provide adequate, and more efficient or more economic transportation. The foregoing provisions are subject to the further limitation that the Commission in prescribing through routes should to the extent consist with the public interest and the restrictions indicated give reasonable preference to the carrier which originates the traffic.

The establishment of the routes sought would assertedly increase the source of supply for California flour buyers [fol. 333] and also the markets for Montana wheat and thus be necessary and desirable in the public interest. In addition, the complainant urges that the term "public interest" refers as much to the shipper who uses the service as it does the public generally and has a direct relation to the adequacy of the transportation service. Consequently, the Commission is asked to find that the new routes are necessary or desirable since the existing service is inadequate because the wheat may not be transported over routes via the mill at Milton-Freewater through to the considered destination at rates equal to those available to mills located at intermediate points on other routes such as Seattle and Portland. Reliance is placed on *Denver & R. G. W. Ry. Co.* v. *Union P. Ry. Co., supra* and *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588 to support the contention that the routes should be established even though such action may result in requiring the Great Northern without its consent, to embrace in such route substantially less than the entire length of its railroad.

The Great Northern challenges any assertion that the existing routes are unreasonable long and inadequate. It directs attention to the fact that all of the present routes except one are shorter than the route sought; that the Milton-Freewater mill is located in the wheat producing area of Washington and Oregon from which joint rates are applicable with transit at the indicated mill to California markets; and that the route sought will, if established short-haul the Great Northern and result in considerable loss of revenues. The defendant further asserts that there is no basis for a finding under section 3(1) of the act since the Milton-Freewater mill participates to a much greater extent in the California markets than the other mills of the complainant which have available the joint rates.

[fol. 334] The through routes sought would obviously be desirable to complainant. Their establishment would permit the mill at Milton-Freewater to sell flour in California in competition with other mills located on the existing routes without dependency on substituted billing. However, the practice of substituting or switching of billing is fol-

lowed generally by all millers in order to ship grain or milled products beyond the transit point at the most favorable freight charges. Whether the establishment of the routes sought are necessary or desirable by interests other than complainant is not so clearly shown. The complainant asserts that such routes would prove beneficial to the California commercial bakeries and to the wheat producers in Montana. But there is no showing in this record by representatives of those interest that the present routes are inadequate or that there is any need for the ones asked for in this proceeding. In *Chicago M. St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co., supra,* the Commission in commenting on the testimony of shippers of lumber and lumber products that they desired unrestricted routing at competitive joint rates in connection with transit shipments, stated: "While this undoubtedly would be desirable from the shippers' viewpoint, there is no clear showing it would be in the public interest or that it is needed to provide adequate and more effective or more economic transportation".

But even if complainant's interest in having rates from and to the indicated areas via its Milton-Freewater mill the same as those via other mills, including three of its own, be considered sufficient to satisfy the statutory requirements of section 15(3), it is encumbent, before establishing such routes, to consider the limitations in section 15(4). [fol. 335] The statute precludes the establishment of routes that short-haul the originating carrier unless the inclusion of its lines makes the through route unreasonable long as compared with another practicable through route which might otherwise be established; or the through route proposed is needed in order to provide adequate and more efficient or more economic transportation. The routes presently maintained from the Montana origins on the Great Northern are not unreasonably long. All of them with one exception are shorter than the route sought. The one exception exceeds the proposed route by only 63 miles to either San Francisco or Los Angeles. The following table compares the distances of the present route with the ones sought to those cities from the representative Montana point of Chester.

Transit Station	To	Distance Miles	Route
Spokane	San Francisco	1435.1	GN-Chemult-SP
	Los Angeles	1808.1	" " "
Wenatchee	San Francisco	1701.0	GN-Portland-SP
	Los Angeles	2074.0	" " "
Portland	San Francisco	1565.4	GN-Spokane-SP&S-SP
	Los Angeles	1938.4	" " " "
Milton-Freewater	San Francisco	1638.9	GN-Spokane-Up
	San Francisco		Portland-Sp
	Los Angeles	2011.9	GN-Spokane-UP
	Los Angeles		Portland-SP

The Great Northern estimates that based on current tonnage moving via the Milton-Freewater mill, the revenue loss it will sustain if the routes sought are established amounts to $36,000 annually. The revenue loss will be much greater if the other mills located on the Union Pacific in northern Oregon seek and obtain similar relief. The carrier estimates the revenue loss under such an eventuality at an additional $115,000. If California sales by such mills dis- [fol. 336] placed any flour now sold by mills located on the Great Northern by virtue of obtaining the through routes and joint rates sought, then the revenue loss would be correspondingly greater. The complainant now has a flour mill capacity of more than 7,000 hundred weight at its three mills located on the through routes presently available on traffic destined to California and southern Oregon from Great Northern origins in Montana. This capacity is about three times that of the Milton-Freewater mill. About 70 percent of the flour production of the latter mill has been shipped to California despite the absence of through routes and joint rates.

As indicated, recent decisions of the Commission and the Courts have set forth well defined principle of construction with respect to the provisions of sections 15(4). The following excerpt from *Denver & R. G. W. R. Co.* v. *Union P. T. Co., supra* is illustrative:

> Section 15(4) empowers the Commission to consider the interests of shippers and the kind of services they

> get and need as well as the interests of carriers in determining whether additional routes should be established to provide "adequate" and "more economic" transportation service. We have held that in determining this question the Commission should look beyond the mere adequacy of the carrier's physical operations "to the broader public interest which embraces service to shippers and the rates they pay". *Pennsylvania R. Co.* v. *United States,* 323 U. S. 588, 591-593. The duty of the Commission, as we there stated, is to try to strike a fair balance in satisfying the needs of shippers, railroads, and the public. This of course calls for the Commission to exercise its informed judgment, having in mind its statutory obligation to develop coordinate and preserve an adequate national transportation system.

The expression "more efficient or more economic transportation" applies to both carriers as well as shipper interests. In striking the fair balance referred to by the Court it is essential to review the interest of both. In the circumstances here presented complainant's interest in obtaining the new routes is outweighted by the adverse effect the short-haul routes would have on the Great Northern.

[fol. 337] Initially, evidence was presented to show that the absence of the through routes and joint rates subjected complainant to the payment of unduly prejudicial rates. With the substitution of the present complainant (originally indicated to be unjustly preferred by rates and routes maintained by the Great Northern over routes via mills at Spokane, Wenatchee, and Portland) the issue under section 3(1) is not stressed. A finding of a violation under that section would appear to be precluded by the decision in *Union Pacific R. Co.* v. *United States,* 132 F. Supp. 72, in which the Court stated at page 80:

> • • • The prohibition of section 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not

apply to a situation such as this where the comparison or preferences or advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion.

The cited decision was affirmed in *Denver & R. G. W. R. Co.* v. *Union P. Co., supra,* but the Court stated, " * * * we have no occasion to consider contentions raised under sections 3(1) and 3(4)." However, the foregoing expression is favorably referred to by the Commission in *Chicago M., St. P. & P. R. Co.* v. *Spokane P. & S. Ry. Co., supra.* It is also established that more than 70 percent of the production of the Milton-Freewater mill has been shipped to California during recent years. This compares with some 30 percent of the production of complainant's three other mills. The evidence is not sufficient to support a finding of unlawfulness under section 3(1) of the act.

The Commission should find that rates on wheat and wheat products, in carloads, from origins on the lines of the defendant Great Northern Railway Company in Montana to destinations in Oregon south of Portland and in [fol. 337a] California over routes through Milton-Freewater, Oreg., have not been shown to be unreasonable or unduly prejudicial. The Commission should further find that through routes and joint rates on wheat and wheat products in carloads from origins on the lines of the defendant Great Northern Railway Company to destinations in Oregon south of Portland and in California through Milton-Freewater, Oreg., for transit are not shown to be necessary or desirable in the public interest. The complaint should be dismissed.

[fol. 338]

BEFORE INTERSTATE COMMERCE COMMISSION

No. 32015

PRESTON-SHAFFER MILLING COMPANY

v.

GREAT NORTHERN RAILWAY COMPANY et al.

Decided July 14, 1958

Failure of defendants to establish joint rates on wheat and wheat products, in carloads, from origins in Montana to destinations in Oregon south of Portland and in California, over routes through Milton-Freewater, Oreg., found unduly prejudicial and preferential. Basis for removal of unlawfulness prescribed.

S. J. Wettrick for complainant.

R. Paul Tjossem and Robert F. Garing for defendants.

REPORT OF THE COMMISSION—July 14, 1958

Division 2, Commissioners Winchell, Murphy, and Minor

By Division 2:

Exceptions to the report proposed by the examiner were filed by the complainant, and the defendants replied. We have heard the parties in oral argument. Our conclusions differ from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on June 19, 1956, the Preston-Shaffer Milling Company, a corporation then engaged in the operation of flour mills and adjoining elevators at Waitsburg, Wash., and Milton-Freewater and Athena, Oreg., alleges

[1] Predecessor in interest to Centennial Mills, Inc., Seattle, Wash., as explained in the report.

[fol. 339] that the combination rates[2] applicable on wheat and wheat products, in carloads, from Cut Bank, Mont., and stations in Montana east and south thereof on the Great Northern Railway Company,[3] to destinations in Oregon south of Portland, and in California on the Southern Pacific and the Santa Fe, over the route of the Great Northern to Spokane, Wash., the Union Pacific to Portland, and connections beyond, with transit at Waitsburg, Milton-Freewater, and Athena, are unjust, unreasonable, unduly prejudicial to its mills, and unduly preferential of its competitors on other routes over which joint rates apply. We are asked to prescribe just, reasonable, and nonprejudicial joint rates for the future and, if necessary, to require the establishment of through routes under the provisions of section 15(3) and (4) of the Interstate Commerce Act.

During the progress of the proceeding, Preston-Shaffer sold its flour mill at Milton-Freewater to Centennial Mills, Inc., of Seattle, which has been operating the mill since May 1, 1957. Centennial also owns and operates flour mills at Spokane and Wenatchee, Wash., and at Portland. Centennial originally participated in this proceeding in support of the Great Northern, but because of the change in interest it now adopts the testimony of Preston-Shaffer, and, upon request, it has been substituted as the complainant herein. [fol. 340] The flour mills at Waitsburg and Athena are no longer operating, and the allegations with respect to those points will not be further considered.

Since 1925, with the development of large bakeries and the trend toward commercial production of bread, flour mills in the Pacific Northwest have been active in the California market, where the deficit flour production amounts

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[2] Rates and differences in rates are stated per 100 pounds, and are those in effect on October 1, 1956.

[3] The complete names of the railroads and the short names by which they will be referred to herein, are as follows: Great Northern Railway Company, as Great Northern; Union Pacific Railroad Company, as Union Pacific; The Atchison, Topeka and Santa Fe Railway Company, as Santa Fe; Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as the Milwaukee; Northern Pacific Railway Company, as Northern Pacific; and Southern Pacific Company, as Southern Pacific.

to about 9 million hundredweight annually. The mill at Milton-Freewater is located in northeastern Oregon and is served by the Union Pacific and Northern Pacific. It has a capacity of 2,400 hundredweight of flour per day. Since about 1947 it has been used primarily in the milling of flour for California commercial bakeries. Prior to that time, Preston-Shaffer supplied those bakeries from a mill at Pendleton, Oreg. When the latter mill was destroyed by fire in 1947, the production of bakery flour moved to the other mills, which prior to that time were used generally for the production of family flour.

Wheat produced in Washington, Oregon, and Idaho is not generally suitable for milling into bakery flour; in 1955, soft white wheat, used for pastry and cake flour, amounted to about 90 percent of the total wheat production in those States. Most of the wheat grown in Montana is either so-called hard winter or hard spring wheat. Hard winter wheat is generally used for family flour. Hard spring wheat has a higher protein content and a higher gluten quality, which produces flour able to withstand handling in the bakeries and to provide a large loaf volume. In recent years the commercial bakeries have insisted upon specifications in their flour orders which require the milling of hard spring wheat. All bakery flour is milled from varying proportions of such wheat.

Western millers obtain their supply of wheat for bakery [fol. 34[illegible]] flour generally from the central and north central areas of Montana, the freight rates from these areas being lower to the Pacific Coast than to Minneapolis and Duluth, Minn., the eastern markets. About 79 percent of Montana spring wheat originates in the north or north central areas adjacent to the lines of the Great Northern, and the remainder is produced along the lines of the Milwaukee. From 1950 to 1955, about 280 million bushels of wheat were produced in central Montana, or an annual average of 46 million bushels, about equally divided between the winter and spring varieties. However, during that period a significant change developed. Hard spring wheat declined from 26.3 million bushels in 1950 to 13.4 million bushels in 1955, and from 69 to 27 percent of total harvested acreage,

while during the same period hard winter wheat increased from 12 million to 42 million bushels, and from 31 to 73 percent of the total acreage. The shift in production was due to the better resistance of winter wheat to winter damage, and its greater average yield which more than offsets the higher prices paid for spring wheat.

Formerly, Preston-Shaffer obtained from 35 to 52 percent of its spring-wheat requirements from origins on the Milwaukee. However, in recent years the production of spring wheat has been largely concentrated in the more northerly areas adjacent to the lines of the Great Northern, and in the 1955-56 crop year Preston-Shaffer was able to obtain only about 9 percent of its requirements from Milwaukee origins. There have been instances, particularly during 1955, when Pacific Northwest flour mills had to purchase spring wheat in northeastern Montana from which the freight rates to the Pacific Coast are higher than to the eastern markets. Joint rates from origins on the Great Northern in eastern Montana over routes via the Milton-Freewater mill are also sought in this proceed-[fol. 342]-ing.

Rates on wheat and wheat products from Montana origins to Pacific Coast points were prescribed in *Grain and Grain Products,* 205 I.C.C. 301 and 215 I.C.C. 83. From the central and north central areas of Montana, a base rate of 39 cents was prescribed to North Pacific terminals, including Portland, which with subsequent general increases has become 72 cents. It applies from Montana origins on the Great Northern to Portland over the route of the originating carrier to Spokane and the Union Pacific beyond. Transit is accorded under that rate at Milton-Freewater. However, when traffic originated at those Montana points and transited at Milton-Freewater moves to destinations in Oregon south of Portland and in California, the rates from Portland to the destinations are added to the 72-cent rate. To San Francisco, for example, the rate from Portland is 77 cents, resulting in a combination rate of $1.49, and to Los Angeles the combination is $1.77.

While at the time of the cited proceeding, joint rates were published from Montana to California only over

routes through Seattle, Wash., and Portland to afford the originating carriers their long hauls, the carriers were required to establish the joint rate of 65 cents prescribed therein also over the short routes through Butte, Mont. Routes from the Montana origins via Spokane, Milton-Freewater, and Portland to California were not considered therein, but subsequently the Northern Pacific and Milwaukee established joint rates over those routes from Montana origins on their lines. With the addition of subsequent general increases, the 65-cent rate has become $1.185, and that is the present joint rate from the Montana origins to both San Francisco and Los Angeles over through routes provided in the tariffs. It is 30.5 and 58.5 cents less than the assailed combination rates to those respective points. To Oregon destinations south of Portland, the combinations exceed the joint rates by amounts [fol. 343] ranging from 7 cents at Salem to 15.5 cents at Klamath Falls.

The distances from Chester, Mont., as a representative origin, over the lines of the Great Northern to Spokane, the Union Pacific (via Milton-Freewater) to Portland, and the Southern Pacific beyond, are 1,639 miles to San Francisco and 2,012 miles to Los Angeles. Over the route of the Great Northern to Chemult, Oreg., and the Southern Pacific beyond, the distances are 1,435 miles to San Francisco and 1,808 miles to Los Angeles, and over the Great Northern to Portland and the Southern Pacific beyond they are 1,701 and 2,074 miles, respectively. The distances over the route via Milton-Freewater thus compare favorably with those over existing through routes, and no material difference in operating conditions over any of these routes is indicated.

Prior to World War II, Preston-Shaffer obtained the necessary grain in Montana. It was milled in transit, and the flour was shipped to Portland under the joint rail rates; and from Portland by water to California destinations. From 1938 to 1941, the rail-water rates from Montana to San Francisco and Los Angeles were lower than the all-rail rates from and to the same points. During World War II, the water service was discontinued, but the water-competitive port-to-port rail rates between Portland and

California were continued in effect until September 1, 1947, when this Commission withdrew fourth-section relief for the maintenance of those rates, and thereafter the normal rail rates applied.

Following the cancellation of the port-to-port rail rates, Preston-Shaffer requested the Great Northern to establish the joint rates over routes via its mills, but further negotiations were delayed pending a final decision in *General Mills, Inc.* v. *Great Northern Ry. Co.*, 269 I.C.C. 457, sustained in *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921, 336 U.S. 933. In that proceeding, the Great [fol. 344] Northern maintained through routes and joint rates on wheat and wheat products from points on its lines in central Montana through Butte to points in California. When transit was accorded at Great Falls, Mont., an intermediate point over those routes, the defendant collected charges based on combination rates. On the same route, milling in transit was permitted by other lines at points south of Butte. The failure to establish transit privileges at Great Falls in connection with the established joint through rates to and from the considered points over routes through Butte was found unreasonable and unduly prejudicial. Following the decision in that proceeding, negotiations were resumed, but after the Great Northern advised that it would not join in the publication of the joint rate over the route sought via Milton-Freewater, the present complaint was filed.

The assurance of continued access to the California market is the objective of the complainant. Preston-Shaffer's sales to California bakeries ranged from 922,000 hundredweight in 1951 to 1,018,000 hundredweight in 1955, and averaged about 70 percent of its total production. It was able to continue its sales in California and even increase them slightly, despite the rate disparity, by the substitution of tonnage or switching of billing. This practice, permitted by appropriate tariff provisions, enables the miller by surrender of the inbound billing to take an allowance equal to the freight charges paid on the movement of grain from any origin to the transit point, and to ship the milled product beyond the transit point at the remainder or balance of the rate applicable from the origin of the grain for

which billing is surrendered to the ultimate destination of the milled product.

To secure the most favorable freight charges on flour moved from Milton-Freewater to destinations south of [fol. 345] Portland, even though milled from grain originated at origins on the Great Northern, Preston-Shaffer would surrender billing for grain originated at other points from which joint rates applied, such as those in Montana on the Milwaukee or at points in Washington and Oregon where the company purchases white wheat.

Flour movements from Milton-Freewater to California points south of Stockton and San Jose have been limited by the amount of wheat originated by Preston-Shaffer at the Milwaukee origins in Montana. On flour movements to northern California destinations, Preston-Shaffer surrendered billing on grain from origins in Washington and Oregon. Because an increasing proportion of its wheat requirements moved from Montana origins on the Great Northern, there was an insufficient amount of substitute billing to move flour to California destinations at charges competitive with mills having available the joint through rates. A further complication has been the disposition of inbound billing on grain from origins on the Great Northern. From July 1, 1955 to June 30, 1956, Preston-Shaffer purchased some 55 million pounds of wheat at Great Northern origins. The billing on 37 million pounds was used to move flour and mill feed to Portland and adjacent points to which joint rates were applicable, and the balance was about equally divided between export shipments of flour and wheat through North Pacific ports.

On some shipments of flour and mill feed, Preston-Shaffer was compelled to pay the combination rates over Portland because of a lack of the necessary billing. These movements were restricted to destinations in Oregon to which the difference between the combinations and the joint rates was comparatively small. During the crop year 1955-1956, it shipped some 8 million pounds of flour and mill feed to southern Oregon destinations, on which it paid [fol. 346] approximately $6,000 more in transportation charges than it would have paid if billing had been available to enable it to move that tonnage at the joint rates.

No shipments were made to California destinations on which the combination rates over Portland were paid.

Although the complainant operates mills located on routes over which the joint rates are applicable, it pursues the objectives originally sought by Preston-Shaffer because the Milton-Freewater mill is engaged largely in the milling of bread flour for the California bakeries. An important consideration in acquiring that mill was the fact that, unlike the complainant's other mills, it is equipped to load cars with bulk flour. Since handling in bulk form is more economical, some of the large California bakeries are converting their operations to receive flour in that manner, and it is expected to become the common practice.

The Great Northern maintains that it will lose substantial revenue if required to establish through routes and joint rates via Milton-Freewater. Of the flour sold by Preston-Shaffer in California during 1955-1956, the volume made from Montana spring wheat is estimated at 39,660 tons. Distributing those tons to California destinations in the same ratios as the tons terminated at those destinations bore to the total tons of wheat and flour from Montana to California in the year 1955, the Great Northern estimates that its revenue from the present joint rates for the haul to Portland would be $506,774, or $12.77 a ton. Out of the present joint rates from origins to Portland via Spokane, its estimated revenue on 39,660 tons is $347,422, or $8.76 a ton. The average distances from origins in Montana having an annual wheat production of a half million bushels or more are 1,016 miles to Portland and 503 miles to Spokane. The distance from Spokane to Portland [fol. 347] is 370 miles, or about 42 percent of the total average distance via Spokane to Portland. The Southern Pacific would retain its share of the joint rates beyond Portland. Division of the revenue to Portland on a mileage prorate basis, at the above estimations, would result in 58 percent of $506,774 or $293,931 accruing to the Great Northern, the equivalent of $7.41 a ton. The loss to the Great Northern, measured by the difference between its share of the present joint rates from origins via Spokane to Portland and of its share of the joint through rates sought via Spokane to the California destinations, as com-

puted above, would amount to $1.35 a ton. In addition, it fears additional losses from extensions of the joint rate which might be sought in the future by other mills.

While the complainant takes the position that through routes presently exist from the Montana origins to the considered destinations and that we can require the application of the joint rates without regard to section 15(3) and (4), alternatively it maintains that the evidence warrants the prescription of through routes under those provisions. As stated in *Thompson* v. *United States*, 343 U.S. 549, the existence of a through route depends upon the circumstances of the particular case, and that (page 557): "In short, the test of the existence of a 'through route' is whether the participating carriers held themselves out as offering a through transportation service". The evidence shows that the originating carrier's traffic officials have refused to accede to several requests for the establishment of the joint rates over routes through Milton-Freewater, and that course of action strongly indicates that there is no holding out to perform through service over such routes. Nor do the shipments made by the complainant at the combination rates to Oregon destinations south of Portland establish such holding out. In *Denver & R.G.W.R. Co.* [fol. 348] v. *Union P.R. Co.*, 351 U.S. 321, 329, a limited movement at higher combination rates was held to be insufficient evidence of the existence of through routes.

Section 15(3) empowers us to establish through routes and joint rates whenever deemed by us "to be necessary or desirable in the public interest." The Great Northern contends that under that section we must determine that there is some "actual necessity" or some "compelling reason" to find that the sought through routes are in the public interest. In this connection it is pointed out, and it was observed in the proposed report, that no representatives of either the California commercial bakeries or of the Montana wheat producers, groups which the complainant asserted would be benefited, offered evidence that the present routes are inadequate or that the relief sought is needed. In *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I.C.C. 333, upheld by the Supreme Court in *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588, it was stated, at page 338:

The Pennsylvania also contends that the routes sought are not "necessary and desirable" in the public interest because of the fact that "the complaint was not supported by any shipper of grain or its products at points of origin, by any receiver of mixed feed at destinations or by producers or consumers of grain in the Cumberland Valley" and because of the fact that "upon the record there is no basis for assuming that any of these are dependent upon the transit operation being performed at Hagerstown."

In *Cancellation of Rates and Routes via Short Lines*, 245 I.C.C. 183, the Commission said: "The words 'necessary and desirable' do not in either case connote indispensability." In *Floxy Milling Co.* v. *Central New England Ry. Co.*, 93 I.C.C. 129, the Commission said, at page 133:

> It is true that no producers of the inbound commodities, retailers of complainant's products, or ultimate consumers appeared at the hearing to testify that they would be benefited by the joint rates asked. It may also be true that retailers and consumers encounter no great difficulty in securing an adequate supply of grain products and mixed feeds from mills [fol. 349] located on established routes over which joint rates with transit apply. But an individual shipper is entitled to the reasonable use of existing transportation facilities at reasonable rates, rules, and regulations measured in the light of the business and transportation practices in the industry in which he is engaged.

There is no dispute that the marketing of flour is a highly competitive business. The evidence shows that hard spring wheat is essential to the milling of flour which meets the specifications of the commercial bakeries, and that the producing region of hard spring wheat has been receding to the Montana area served by the Great Northern. Although the complainant's predecessor had been able to remain competitive at points in this destination territory by resorting to the substitution of billing, the changing production pic-

ture is making that procedure most difficult by limiting available billing and causing an accumulation of billing which cannot be used to ship flour to those destinations at rates comparable to the joint rates available to its competitors. In addition to the close surveillance of all inbound billing which the complainant has been compelled to practice, during the last crop year it leased space at Spokane where about 250,000 bushels, delivered on Great Northern billing, were stored and later shipped out on billing which could be used to reach the considered destinations. It is estimated that the transaction cost the complainant $10,000 in addition to storage charges. In these circumstances, we conclude that the continued refusal of the Great Northern to concur in the publication of joint rates from origins on its lines through Milton-Freewater to destinations in Oregon beyond Portland and in California, with transit at Milton-Freewater, is and will be unduly prejudicial to the mill of Milton-Freewater and unduly preferential of competing mills located on routes presently enjoying the joint rates.

[fol. 350] As previously observed, the Great Northern presently participates in joint rates via Milton-Freewater as far as Portland. By extending its participation in joint rates to this destination territory, the unlawfulness herein found to exist will be removed. Our authority to prescribe the manner of removing such unlawfulness was sustained in *New York* v. *United States*, 331 U.S. 284, 340-341, and *Ayrshire Collieries* v. *United States*, 335 U.S. 573, 593-594.

We find that the failure of the defendants to establish joint rates on the described traffic over routes through Milton-Freewater, with transit at that point, is unduly prejudicial to the complainant's mill there located and unduly preferential of competitors' mills located on routes over which joint rates presently apply. We further find that it is necessary and desirable in the public interest that the unlawfulness thus found to exist be removed by the establishment of the latter joint rates over routes via Milton-Freewater, with transit at that point.

An appropriate order will be entered.

[fol. 351]

BEFORE INTERSTATE COMMERCE COMMISSION

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 14th day of July, A. D. 1958.

No. 32015

PRESTON-SHAFFER MILLING COMPANY,

v.

GREAT NORTHERN RAILWAY COMPANY et al.

ORDER—July 14, 1958

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusion thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 23, 1958, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of wheat and wheat products, in carloads, from points in Montana described in the succeeding paragraph hereof to points in Oregon south of Portland, Oreg., and to points in California, rates which exceed those on the basis prescribed in the next succeeding paragraph:

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 23, 1958, upon not less than 30 days' notice to this Commission and to the general public in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern Railway Com-

pany east and south of Cut Bank, Mont., including Cut Bank, to points in Oregon south of Portland and to points in California on the lines of the Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company, over the routes of the Great Northern Railway Company to Spokane, Wash., Union Pacific Railroad Company to Portland, Oreg., with transit at Milton-Freewater, Oreg., thence the Southern Pacific Company (in connection with The Atchison, Topeka and Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

Harold D. McCoy, Secretary.

(Seal)

[fol. 352]

BEFORE INTERSTATE COMMERCE COMMISSION

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of December A. D., 1958.

No. 32015

PRESTON-SHAFFER MILLING COMPANY,

v.

GREAT NORTHERN RAILWAY COMPANY et al.

ORDER—December 1, 1958

Upon consideration of the record in the above-entitled proceeding, and of petition of defendants, filed August 25, 1958, for reconsideration and oral argument, of the report and order of division 2 of July 14, 1958;

It is ordered, That the said petition be, and it is hereby denied, for the reason that the findings of fact and con-

clusions in the report of the Commission, division 2, are fully supported by the evidence, and the matters submitted in support of the petition do not present substantial and material grounds to warrant reopening the proceeding for reconsideration, or oral argument.

It is further ordered, That the order entered in this proceeding on July 14, 1958, which order, pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petition, be, and it is hereby, reinstated and modified so as to become effective on January 16, 1959, without change in the requirements of said order.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 353]

BEFORE INTERSTATE COMMERCE COMMISSION

No. 32015

PRESTON-SHAFFER MILLING COMPANY,

v.

GREAT NORTHERN RAILWAY COMPANY et al.

In the Matter of Defendants' Request for Postponement of the Effective Date of Order

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Present:

John H. Winchell, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

ORDER—January 12, 1959

Upon consideration of defendants' telegraphic request dated January 8, 1959, for postponement of the effective date of the order; and good cause appearing:

It is ordered, That the order entered in this proceeding July 14, 1958, as modified by order of the Commission dated December 1, 1958, requiring defendants to take certain

action on or before January 16, 1959, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, be, and it is hereby, further modified so as to postpone the effective date thereof to February 16, 1959, without change in the requirements of said order.

Dated at Washington, D. C., this 12th day of January, A. D., 1959.

By the Commission, Commissioner Winchell.

Harold D. McCoy, Secretary.

(Seal)

[Handwritten]
Approved
1-12-59
J.H.W.

[fol. 354]

BEFORE INTERSTATE COMMERCE COMMISSION

No. 32015

PRESTON-SHAFFER MILLING COMPANY,

v.

GREAT NORTHERN RAILWAY COMPANY et al.

In the Matter of Postponement of the Effective Date of Order

Present:

Kenneth H. Tuggle, Chairman, to whom the above-entitled matter has been assigned for action thereon.

ORDER—January 19, 1959

On January 15, 1959, the United States District Court for the District of Minnesota, Fourth Division, Honorable Gunnar H. Nordbye, Chief Judge, in an action entitled *Great Northern Railway Company* v. *United States and Interstate Commerce Commission*, Civil Action No. 4-59—

Civil 5, entered a temporary restraining order enjoining and restraining the effective date, operation, application and effectiveness of the order of the Commission dated July 14, 1958, as modified, in the above-entitled proceeding, until further hearing and order of said Court. Therefore, solely in obedience to said temporary restraining order,

It is ordered, That the effective date, operation, application and effectiveness of the order of the Commission, Division 2, dated July 14, 1958, as modified, in said proceeding, be, and they are hereby, postponed and suspended until further order of the Commission.

Dated at Washington, D. C., this the 19th day of January, A. D., 1959.

By the Commission, Chairman Tuggle.

Harold D. McCoy, Secretary.

(Seal)

Office Supreme Court, U.S.
FILED
AUG 10 1959
JAMES R. BROWNING, Clerk

No. 297

IN THE

Supreme Court of the United States

October Term, 1958

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CENTENNIAL MILLS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1958

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GREAT NORTHERN RAILWAY COMPANY,
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Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CENTENNIAL MILLS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the United States District Court for the District of Minnesota entitled "Memorandum Decision," dated and entered May 15, 1959,

dismissing its action to permanently enjoin and set aside an order of the Interstate Commerce Commission.

OPINIONS BELOW

The decision of the United States District Court for the District of Minnesota from which this appeal is taken is reported at 172 F. Supp. 705. A copy thereof is attached as Appendix A. Subsequently said court granted an injunction pending appeal. A copy of the Findings of Fact; Conclusions of Law and Injunction Pending Appeal dated and entered July 24, 1959, which are unreported, is attached as Appendix B.

The Interstate Commerce Commission's report accompanying the order sought to be enjoined and set aside is reported at 304 I.C.C. 491, and a copy is attached as Appendix C. A copy of the proposed report of the Commission's examiner is attached as Appendix D.

JURISDICTION

This suit was brought pursuant to Sections 1336, 1398, 2284, and 2321-2325, Title 28, U.S.C.A., to permanently enjoin an order of the Interstate Commerce Commission dated July 14, 1958, as subsequently modified in respect to its effective date. Said order requires appellant, a common carrier by railroad in interstate commerce, and certain connecting rail carriers, to establish and maintain from various origin points on appellant's lines to destinations on the lines of other rail carriers joint rates and through routes, with specified transit privileges, for the transportation of wheat and wheat products. After notice and hearing, the United States District Court for the District of Minnesota on May

15, 1959, entered an order denying a permanent injunction and dismissed appellant's complaint. Notice of appeal was filed in that court June 12, 1959. Jurisdiction of the Supreme Court to review this decision is conferred by Title 28 U.S.C.A., Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review this case on direct appeal: *Denver & Rio Grande Western Railroad v. Union Pacific Railroad*, 351 U. S. 321, 327 (1956); *Thompson v. United States*, 343 U. S. 549, 554 (1952); *United States v. Great Northern Railway Co.*, 343 U. S. 562, 568 (1952).

STATUTES INVOLVED

Sections 3(1), 3(4), 3(5), 15(3) and 15(4) of the Interstate Commerce Act, as amended (49 U.S.C.A. Secs. 3(1), 3(4), 3(5), 15(3) and 15(4)) are set forth in Appendix E hereto.

QUESTIONS PRESENTED

1. May undue prejudice and preference in violation of Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. Sec. 3(1)) result from the refusal of an originating railroad to short-haul itself by joining in through routes and joint rates with another, independent railroad, with transit on the lines of the latter railroad, to reach destinations which are also reached, with transit, over existing routes in which the originating carrier participates and which afford it a greater haul?

2. Is there substantial evidence to support the Interstate Commerce Commission's finding under Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. Sec. 3(1))?

3. Is said Commission's order invalid because it will require the establishment of a new through route short-hauling an originating railroad without findings under either clause (a) or clause (b) of Section 15(4) of the Interstate Commerce Act (49 U.S.C.A. Sec. 15(4))? This question includes the following subsidiary question: Did said Commission's finding of undue preference and prejudice under Section 3(1) of the Interstate Commerce Act make inapplicable the short-hauling limitation upon the Commission's power to prescribe through routes as such limitation is set forth in said Section 15(4), and dispense with the necessity for findings under clauses (a) and (b) thereof?

4. Is there substantial evidence in the record to support said Commission's finding that the prescribed new through route and joint rates are "necessary and desirable in the public interest" as required by Section 15(3) of said Act (49 U.S.C.A. Sec. 15(3))?

STATEMENT

On June 19, 1956, Preston-Shaffer Milling Company operated a flour mill at Milton-Freewater, Ore., located on the lines of the Union Pacific* between Spokane, Wash., and Portland, Ore. Milton-Freewater is also reached by the

*The complete names of the railroads and the short names by which they will be referred to herein, are as follows: Great Northern Railway Company, as the Great Northern; Union Pacific Railroad Company, as the Union Pacific; The Atchison, Topeka and Santa Fe Railway Company, as the Santa Fe; Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as the Milwaukee; Northern Pacific Railway Company, as the Northern Pacific; Southern Pacific Company, as the Southern Pacific; Spokane, Portland & Seattle Railway Company, as the SP&S; and Western Pacific Railroad Company as the Western Pacific.

Northern Pacific's lines between Spokane and Portland. The outline map, Appendix F, attached shows the principal points in Washington and Oregon and the routes through western junctions which are here involved.

On that date, the Preston-Shaffer Company filed a complaint with the Interstate Commerce Commission alleging that the combination rates applicable on wheat and wheat products in carloads from origins in Montana on appellant's (Great Northern's) lines east and south of Cut Bank, including Cut Bank, to destinations in Oregon south of Portland and in California over the route of the Great Northern to Spokane, the Union Pacific to Portland, and connections beyond, with transit at Milton-Freewater were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, unduly prejudicial to complainant and its traffic and unduly preferential of its competitors on other routes over which joint rates apply, in violation of Section 3 of said act. Preston-Shaffer requested the Commission to prescribe just, reasonable and nonprejudicial joint rates with transit via Milton-Freewater and, if the Commission should find that through routes do not exist for the traffic described via complainant's milling point, that it require establishment of such through routes under the provisions of Sections 15(3) and 15(4) of said act. (304 I.C.C. 491-492, *infra*, pp. 38-39). During the course of the Commission proceeding Preston-Shaffer sold its flour mill at Milton-Freewater to Centennial Mills, Inc., one of the appellees, which has been operating the mill since May 1, 1957. Centennial operates flour mills not only at Milton-Freewater but also at Spokane and Wenatchee, Wash., and at Portland. An officer of Centennial originally testified for appellant in the Commission proceeding, but after the change in ownership

Centennial adopted the testimony for Preston-Shaffer and was substituted for it as the complainant before the Commission, (304 I.C.C. 492, *infra*, p. 39.)

There have long been in effect joint rates on wheat and wheat products applicable from all of the origins to all of the destinations here involved, with transit at intermediate milling points, at the level which Centennial seeks. But such joint rates do not apply via the lines of the Union Pacific between Spokane and Portland, on which Milton-Freewater is located. Instead they apply via routes giving the Great Northern system a greater share of the haul. Such routes embrace the Great Northern extending from Montana, through Spokane, to Portland or Chemult, Ore., thence Southern Pacific and its connections to destination; or Great Northern to Bieber, Calif., thence Western Pacific and its connections to destination; or Great Northern to Spokane, thence its subsidiary, the SP&S, to Portland, thence Southern Pacific and its connections to destination. (See map, Appendix F.) Each of Centennial's mills at Spokane, Wenatchee and Portland is on one or more of these routes. Joint rates at the level sought also apply from a portion of the Montana origin territory here involved to California via the Great Northern to Butte, Mont., thence Union Pacific and its connections, a route established by the Commission over Great Northern opposition.

At the turn of the century and before Great Northern reached Portland with its own lines or those of the SP&S, it established joint rates on wheat and wheat products from all of the origins here involved applicable via Great Northern to Spokane, thence as far as Portland over a route embracing the lines of the Oregon Railroad and Navigation Company beyond Spokane. At that time this was the only route over

which Great Northern shippers reached Portland by rail. Such rates were continued in effect via that route after the Oregon Railroad and Navigation Company was acquired by the Union Pacific. The privilege of milling in transit at Milton-Freewater is available in connection with these joint rates to Portland.

Under the long-standing rate and routing adjustment outlined above, if wheat from a particular Montana origin, e.g., Chester, were milled into flour at Milton-Freewater and thence shipped either to a destination in Oregon south of Portland or to California, there would be added to the joint through rate from Chester to Portland, the separately published rate of the Southern Pacific from Portland to destination. The combination of these two rates would result in a total charge on wheat from Chester milled at Milton-Freewater, and terminated as flour at San Francisco, for example, of $1.49 per hundred pounds. If terminated at Los Angeles the charge would be $1.77 per hundred pounds. However, the joint rate from Chester to California applicable over a route giving appellant its longer haul, with milling in transit at Wenatchee, for example, is $1.18½ per hundred pounds for termination at either San Francisco or Los Angeles. The lower joint rates applicable over routes according the originating carrier a greater share of the haul attract the traffic to such routes and that is their purpose. There is no evidence that the carriers here involved hold themselves out to perform through service from Montana origins on the Great Northern either to California or to southern Oregon over routes via Milton-Freewater, and both the Commission and its examiner have found that any such through routes via Milton-Freewater do not exist. (304 I.C.C. 494-497, *infra*, pp. 41-42, 47-48, 67.)

The Commission's examiner Edward L. Boisseree issued a proposed report recommending that the Commission find that the assailed combination rates on the involved traffic via Milton-Freewater were not shown to be unreasonable or unduly prejudicial; that through routes on such traffic via Milton-Freewater for transit were not shown to be necessary or desirable in the public interest under Section 15(3) of the Act; and that the complaint should be dismissed. In arriving at the recommended conclusion with respect to Section 15(3), the examiner specifically considered the conditions in clauses (a) and (b) of Section 15(4) which are required to be met before a carrier may be short-hauled against its consent, and determined that the conditions in neither of said clauses had been satisfied. (Appendix C, *infra*, at pages 68-73.)

After oral argument upon exceptions to the recommended report, the Commission's Division 2 reversed the examiner and found that defendants' failure to establish joint rates on the described traffic over routes through Milton-Freewater, with transit at that point, was unduly prejudicial to complainant's mill there located and unduly preferential of competitors' mills located on routes over which joint rates presently apply. The Division further found it to be necessary and desirable in the public interest that the unlawfulness so found to exist be removed by the establishment of joint rates over routes via Milton-Freewater with transit thereat. The Division did not consider, nor did it make findings upon, the question whether the evidence met any of the conditions set forth in clauses (a) and (b) of Section 15(4), relating to short-hauling. An order was entered July 14, 1958, in accordance with the findings in the Division's report. (*infra*, pp. 50-52.)

Great Northern petitioned the entire Commission for reconsideration. The petition was denied December 1, 1958.

The suit in the court below was filed January 12, 1959; and an order was entered by the District Court on January 15, 1959, temporarily restraining enforcement of the Commission's order. The entire record before the Commission was received in evidence by the court below. In the memorandum decision above referred to the district court held that the Commission's finding of undue preference and prejudice in violation of Section 3(1) of the Act was sustained by the evidence and was within the Commission's statutory power; that the prohibition against short-hauling in Section 15(4) does not apply in cases wherein undue prejudice or preference in violation of Section 3 is established; and that the Commission's order in other respects was based on substantial evidence and was lawful. The complaint was dismissed and the restraining order discharged. A stay of 30 days was granted.

Thereafter, the court ordered an extension of the 30-day stay and continued the restraining order in effect pending determination of appellant's application for an injunction pending appeal. The injunction was granted July 24, 1959, upon the conclusion, *inter alia*, that "decision in this case depends upon a question of law on which there appears to be a conflict among the several district courts of the United States" (*infra*, *p.* 35.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Squarely presented here is the question whether a railroad which does not participate in a proposed through route and which does not have the power to control the granting or withholding of transit at a specified station thereon may, nevertheless, because of its contemporaneous participation in other routes between the same origins and destinations and its grant of transit at intermediate stations on such other routes, be found guilty of undue prejudice and preference in violation of Section 3(1) of the Interstate Commerce Act. Also presented is the further, related question whether a finding of prejudice and preference under such circumstances deprives such carrier of the protection against short-hauling contained in Section 15(4).

Determination of the first question does not depend simply on whether the person denied the proposed route is at a disadvantage compared with some other shipper on another route. The question is whether the alleged advantages and disadvantages can be held in law attributable to appellant. *Central R. R. Co. v. United States*, 257 U. S. 247, 255 (1921).

Under an identical fact situation, the United States District Court for the District of Nebraska in *Union Pacific R. R. Co. v. United States*, 132 F. Supp. 72 (1954), reached a conclusion directly contrary to the decision of the lower court in the instant case. In *Union Pacific*, confronted with the very contentions which were urged upon the district court in this case, the three-judge court said, at page 80:

"* * * The prohibition of Sec. 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in Central R. Co. of New Jersey v. United States, 257 U. S. 247, loc. cit. 259-260, 42 S. Ct. 80, loc. cit. 83, 66 L. Ed. 217, was different, the purpose of Sec. 3(1) was there stated as follows:

"'What Congress sought to prevent by that section, as originally enacted was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of §3.'

"*If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3(1) merely because a shipper entity described in Sec. 3(1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15(4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3(1).*" (Emphasis supplied.)

In the *Union Pacific* case it was claimed that combination rates maintained by the Union Pacific and Rio Grande* were unduly prejudicial to shippers located on the Rio Grande desiring to use in-transit privileges at joint through rates

*The Denver & Rio Grande Western Railroad Company.

and preferential of shippers on the routes of the Union Pacific who were able to avail themselves of such privileges at joint through rates (*id.*). The similarity of the facts to those presented here is obvious. The conflict between the results in the two cases, as we have indicated, was recognized by the lower court here when it granted the injunction pending appeal (*infra*, p. 35.)

The decision in *Union Pacific* was appealed to the Supreme Court and was disposed of in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 351 U. S. 321 (1956), but this Court did not reach the Section 3(1) matter now discussed. This Court said, at page 355:

> "Since the Commission's order is justified under §§ 15(1), 15(3) and 15(4), we have no occasion to consider contentions raised under §§3(1) and 3(4)."

The district court here attempted to justify its conclusion that the Commission's finding of a Section 3(1) violation deprived defendant of the protection of Section 15(4) by pointing to the fact that Section 15(4) by its terms prohibits short-hauling "except as provided in section 3," and by citing *Baltimore & O. R. Co. v. United States*, 100 F. Supp. 1002 (S.D. New York, 1951) (*infra*, p. 27). But the reference in Section 15(4) to "section 3" is to subdivisions of Section 3 other than subdivision (1). Section 3(1) simply prohibits the giving of undue preferences and the imposition of undue prejudice in general terms and has, as the cases cited indicate, been uniformly construed as prohibiting only undue differences in treatment which the same carrier or same group of carriers, acting in concert, control. *Central R. R. Co. v. United States*, 257 U. S. 457,

459. Section 3(1) does not in terms forbid retention of a carrier's long haul. On the other hand, discrimination between carriers in the granting or withholding of routes is specifically prohibited by Section 3(4). And the opening of a carrier's terminal facilities to the use of other carriers, which may have the effect of reducing its haul, is authorized by Section 3(5). The parenthetical provision of Section 15(4), "except as provided in section 3," and the addition of Section 3(5) to the Interstate Commerce Act both came into the law at the same time with passage of the Transportation Act of 1920, 41 Stat. 456, 479, 485-6.

The lower court's reliance on the *Baltimore & Ohio* case was misplaced. Though that court did state that participation in through routes which accord a carrier its maximum haul and contemporaneous refusal to participate in proposed routes which would require short-hauling may constitute a violation of Section 3(1) and that such violation will deprive a carrier of the protection against short-hauling afforded by Section 15(4), the entire discussion of this matter in the *Baltimore & Ohio* case is *obiter dicta*. The Commission in the report there under review—unlike the report of Division 2 in the instant case—had made findings under Section 15(4), which justified its order requiring short-hauling. In other words, it had come to grips with the fact that defendants in that case would be short-hauled by the relief sought, and it specifically found under clause (b) of Section 15(4) "that the through routes [sought] were needed in order to provide adequate and more economic transportation." This finding was found to be based on substantial evidence (100 F. Supp. 1002, 1010-1011). That being so, the district court, like the Supreme Court in *Denver & Rio*

Grande v. Union Pacific, supra, had no occasion to consider contentions raised under Section 3(1).

Had the evidence in this case been sufficient, the Commission could have made a finding here, under either clause (a) or clause (b), as the law set forth in Section 15(4) requires it must do before a participating carrier may be short-hauled. Significantly, it did not find either (a) that existing routes were unreasonably long or (b) that the routes via Milton-Freewater sought were necessary to provide adequate, and more efficient or more economic transportation.

The Commission points out that Great Northern presently participates in joint rates and through routes via Milton-Freewater as far as Portland and states that "by extending its participation in joint rates to this destination territory, the unlawfulness herein found to exist will be removed." It cites *New York v. United States*, 331 U. S. 284, 340-341; and *Ayrshire Collieries v. United States*, 335 U. S. 573, 593-594, as sustaining its authority to prescribe the manner of removing the unlawfulness it believed to exist. (*infra*, p. 50.)

The cited decisions, however, do not sustain the Commission's asserted authority. They involved the Commission's power to establish *rates*, not *routes*. In neither case was the issue presented as to the Commission's power to establish through routes under Sections 15(3) and 15(4). And in each case the Commission merely exercised its power under Section 15(1) to prescribe rates. Whatever may be the Commission's power under Section 15(1) to prescribe rates, its power to establish *through routes* is not granted by Section 15(1) but must be found in Section 15(3) as limited by Section 15(4).

Great Northern's participation in through routes as far as Portland did not constitute the establishment of any routes beyond Portland. As this Court said in *Thompson v. United States*, 343 U. S. 549, at page 559:

> "Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *."

There a Commission order prescribing a rate under Section 15(1) over a route in which the appellant had declined to participate, because it would deprive it of its long haul, was set aside because the Commission failed to comply with Section 15(3) as limited by Section 15(4).

In summary, this appeal presents a court holding which disregards the decisions of this Court that the same carrier, or combination of carriers, must be the common source of the disparity in treatment complained of before a violation of Section 3(1) may be found, and presents a lower court decision which, as the district court stated in *Union Pacific*, permits Section 15(4) to be "practically emasculated." The importance of this appeal is indicated by the emphasis placed in the majority opinion in *Denver & Rio Grande v. Union Pacific*, *supra*, upon—

> "the purpose of §15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' without faithful observance of restrictive conditions imposed by that section" (351 U. S. at p. 327),

and by the following language taken from the principal dissenting opinion:

"Although Congress has, from the time of the Commission's creation and especially in recent years, relied on the Commission as its expert adviser on policy, and legislation has largely reflected the Commission's recommendations, the latter's persistence in recommending repeal of §15(4) has been matched and overborne by the persistence of Congress in retaining it. Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled." (351 U. S., at p. 336)

II.

The remaining questions relate to the sufficiency of the evidence to sustain the Commission's finding under Section 3(1) as to undue prejudice to Centennial's mill at Milton-Freewater and preference of competitors' mills located on routes over which joint rates apply, and the sufficiency of the evidence to sustain the Commission's finding that the routes via Milton-Freewater are necessary and desirable in the public interest under Section 15(3).

Centennial's mills at Spokane, Wenatchee and Portland, located on through routes for the movement of wheat and its products from Montana to southern Oregon and to California, have a combined capacity which represents 82 percent of Centennial's total milling capacity. They now have available the joint rates and the transit privileges which complainant in the case before the Commission seeks to have compelled via Milton-Freewater, where it has a mill representing 18 percent of its total capacity. Heretofore Centennial's sales in California of flour produced from mills on the existing through routes constituted 30 percent of its production at those mills. On the other hand, 70 percent of the production of the mill at Milton-Freewater is being

disposed of in California. Total sales in California from the Milton-Freewater plant are increasing. This increase has been achieved despite the rate disparity by the substitution of tonnage or switching of billing, which is permissible under the tariffs. (*infra*, pp. 44, 55, 71-73.)

At the hearing before the Commission exhibits were introduced showing numerous milling points in Oregon and Washington and other states. There was testimony that mills located on the various railroads in these states are with very few exceptions confined in their operations to wheat which they can deliver from shipping points on the railroads serving the mills; i.e., that cross-hauling of grain is not generally permitted from origins on one railroad to a transit location on another. For example, the mill at Wenatchee, Wash., on the Great Northern, cannot draw wheat from Milwaukee, Union Pacific or Northern Pacific origins for transit and reshipment to southern Oregon or California. Thus the Commission by its order would accord complainant's mill at Milton-Freewater an advantage which most mills at other transit points are not permitted.

In the proposed report the examiner states:

> "With the substitution of the present complainant (originally indicated to be unjustly preferred by rates and routes maintained by the Great Northern over routes via mills at Spokane, Wenatchee, and Portland) the issue under section 3(1) is not stressed" (*Infra*, p. 73.)

And further, after a recital of the pertinent facts:

> "The evidence is not sufficient to support a finding of unlawfulness under section 3(1) of the act" (*Infra*, pp. 73-74.)

These matters, together with the financial interest of appellant in the maintenance of its long haul on this important traffic, the wasteful and inefficient transportation which establishment of cross-haul routing encourages, and the public interest in the maintenance of existing routes and channels of trade on which business has been established, which cannot be adequately discussed in a jurisdictional statement, will be brought out on brief to show that the evidence is insufficient to sustain the Commission's findings either that complainant is unduly prejudiced in violation of Section 3(1) or that the routes ordered are necessary and desirable in the public interest under Section 15(3).

CONCLUSION

We submit that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

LOUIS E. TORINUS, JR.
Counsel of record for Appellant
175 East Fourth Street
St. Paul 1, Minnesota

Of Counsel:
ANTHONY KANE

Dated August 7, 1959.

PROOF OF SERVICE

I, LOUIS E. TORINUS, JR., one of the attorneys for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 7th day of August, 1959, I served copies of the foregoing Jurisdictional Statement on the adverse parties, as follows:

1. On appellee United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable William P. Rogers
Attorney General of the United States
Department of Justice
Washington 25, D. C.

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Mr. Victor R. Hanson
Assistant Attorney General of the United States
Department of Justice
Washington 25, D. C.

Mr. John H. D. Wigger
Attorney
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Mr. Fallon Kelly
United States Attorney
221 Federal Courts Building
St. Paul 2, Minnesota

2. On appellee Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Mr. Robert W. Ginnane
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Mr. Francis A. Silver
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On appellee Centennial Mills, Inc., by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Mr. Samuel J. Wettrick
Attorney-at-Law
Arctic Building
Seattle 4, Washington

LOUIS E. TORINUS, JR.
One of the Attorneys for Appellant

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

GREAT NORTHERN RAILWAY COMPANY, a corporation, Plaintiff,

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

CENTENNIAL MILLS, INC.,
Intervening Defendant.

4-59-Civ-5

MEMORANDUM DECISION

[172 F. Supp. 705]

Anthony Kane, General Counsel, Seattle, Wash., L. E. Torinus, General Solicitor, St. Paul, Minn., Robert F. Gar-

ing, Assistant General Attorney, Seattle, Wash., Curtis H. Berg, Attorney, Seattle, Wash., attorneys for plaintiff Great Northern Railway Company.

Victor R. Hansen, Assistant Attorney General, Washington, D. C., Fallon Kelly, United States Attorney, St. Paul, Minn., John H. D. Wigger, Attorney, Department of Justice, Washington, D. C., attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel, Francis A. Silver, Associate General Counsel, Interstate Commerce Commission, Washington, D. C., attorneys for defendant Interstate Commerce Commission.

S. J. Wettrick, Seattle, Wash., attorney for intervening defendant Centennial Mills, Inc.

Before VOGEL, Circuit Judge, NORDBYE, Chief Judge, and DEVITT, District Judge.

DEVITT, District Judge.

This is an appeal from an order of the Interstate Commerce Commission establishing joint rates for the movement of wheat and wheat products from certain Montana points on the lines of the Great Northern Railway Company to points in Oregon, south of Portland, and to California [172 F. Supp. 706]. Statutory jurisdiction is established.

The issue was raised in 1956 by Preston-Shaffer Milling Company by the filing of a complaint with the Interstate Commerce Commission alleging that certain combination rates then in effect in the described area were unjust, un-

reasonable and unduly prejudicial to it and unduly preferential to its competitors on other routes over which the more advantageous joint rates applied, all in violation of Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. 3(1)), which, among other things, prohibits unreasonable prejudice and preference.

The matter was fully heard by a Hearing Examiner. The complainant, Preston-Shaffer, subsequently sold its mill at Milton-Freewater, Oregon, the place allegedly discriminated against by the Great Northern, to Centennial Mills, Inc., which company is an intervening defendant in this appeal.

The Hearing Examiner filed his report recommending dismissal of the complaint. Subsequently, on July 14, 1958, the Commission, Division 2, issued its report finding that the failure of the plaintiff to establish joint rates on the described traffic from Montana to the Oregon and California points, with transit at the Milton-Freewater location, was unduly prejudicial to the complainant's mill there, and was unduly preferential of competitor's mills located on routes over which joint rates did apply. The Commission also ordered the establishment of joint rates not in excess of the lowest joint rates then in effect over competing routes. 304 ICC 491 (1958).

On December 1, 1958, the entire Commission denied a petition for reconsideration of the order of its Division 2, and this appeal followed.

A short explanation of the issue in the light of the undisputed facts may be helpful.

For about the last ten years the mill at Milton-Freewater, Oregon, in the east-central section of the state, has been engaged principally in the milling of bread flour for California bakeries. This flour requires wheat with a high protein con-

tent. This type of wheat is grown principally in the central and north-central areas of Montana where hard spring wheat is raised in large volume. Approximately 79 percent of the wheat originating in these areas is produced at places adjacent to the lines of the Great Northern. The Milton-Freewater mill has, in recent years, obtained 90 percent or more of its wheat supply from locations served by the plaintiff.

There are several flour mills in the northwestern states engaged in milling flour from hard spring wheat for the California market. There are mills at Spokane and Tacoma in Washington, at Portland, Oregon, at Great Falls, Montana, Ogden, Utah and elsewhere. The business is highly competitive.

Wheat purchased by Centennial Mills is moved over the route of the Great Northern to Spokane, Washington, over the Union Pacific to Milton-Freewater, there processed into flour, and again carried by Union Pacific to Portland, Oregon. This entire movement is made under a joint rate, against which no objection is raised. But further movement of the shipment to points south of Portland and to California stations is made under the regularly applicable non-joint rate. The resulting combination rate between Montana stations and points south of Portland and in California is appreciably higher than the joint rate now enjoyed by Centennial's competitors over different, but similar, routes to the same destinations.

To illustrate the alleged discrimination by figures from the Commission's report, the present joint rate available to competing mills on other lines from certain Montana points to San Francisco or Los Angeles is $1.18½ per 100 pounds, while the combination rate available to complainant's mill at Milton-Freewater is $1.49 to San Francisco and $1.77 to

Los Angeles, or 30½ cents and 58½ cents higher than the joint rate. This is the discrimination against which Centennial [172 F. Supp. 707] complains and which the Commission held violated Section 3(1).

The Great Northern contends that there is no substantial evidence in the record to support the action of the Commission in ordering the joint rate, and that doing so and establishing a new through route will substantially short haul it in contravention of its right to the long haul secured by Section 15(4) of the Interstate Commerce Act (49 U.S.C.A. 15(4)).

In determining the issues before us, it is well to recall that the authority of the courts in reviewing the actions of administrative bodies is very limited. We are confined to determining whether there is warrant in the law and the facts for the Commission's action. That is the limit of our province. We cannot substitute our judgment for that of the Commission or challenge the wisdom of its action. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535, 536, 66 S. Ct. 687, 90 L. Ed. 821 (1946); *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227, 228, 63 S. Ct. 589, 87 L. Ed. 724 (1943). For further recent expressions recognizing our circumscribed authority in this respect, see *Quickie Transport Co. v. United States*, 169 F. Supp. 826 (D. C. Minn. 1959); *Minneapolis & St. Louis Ry. Co. v. United States*, 165 F. Supp. 893 (D. C. Minn. 1958); *Canadian Pacific Ry. Co. v. United States*, 158 F. Supp. 248 (D. C. Minn. 1958); *Schaffer Transportation Co. v. United States*, 139 F. Supp. 444, 448 (N.D.S.D. 1956) reversed on other grounds, 355 U. S. 83, 78 S. Ct. 173, 2 L. Ed. 2d 117 (1957).

We have reviewed the record and conclude that there is substantial evidence, considered as a whole, to support the Commission's finding and order.

From the summary of facts recited above and from other evidence in the record, the Commission could well find that complainant's mill at Milton-Freewater was in a disadvantageous competitive position because of the higher rate it was charged. The action of the Commission in concluding that the failure of the Great Northern to establish joint rates constituted undue prejudice to Centennial and undue preference to its competitors within the meaning of Section 3(1) of the Interstate Commerce Act is supported by the evidence and is not unreasonable.

We have examined each of the arguments advanced by Great Northern in support of its view that the evidence does not support the Commission's action, including its contention that no actual prejudice to Centennial has been shown, that Centennial has not lost business under the present combination rates, that by the continued use of "switch billing" any disadvantages could be minimized or obviated, and that Centennial is free to shift its California flour milling operations to one of its other mills where the joint rate is obtainable, and conclude that no purpose will be served by detailed discussions and observations about them. Suffice it to say that they do not convince us that the action of the Commission is unsupported by proof.

Plaintiff also contends that Congress has guaranteed each rail carrier the right to the longest haul possible on its own lines and to the revenue thus obtainable, and that this order deprives it of the long haul and will result in substantial loss of revenue.

The long haul assurance is contained in Section 15(4) of the Interstate Commerce Act, set out in the footnote[1], but [172 F. Supp. 708], as will be observed by the underlined portion in the second line, the prohibition against short hauling does not apply to cases under Section 3 of the Act. The Commission took action here under Section 3.

In effect the Congress has permitted the Commission to short haul where undue prejudice or preference is established. *Baltimore & Ohio Ry. Co. v. United States*, 100 F. Supp. 1002 (S.D.N.Y. 1951).

[1] "In establishing any such through route the Commission shall not (*except as provided in section 3 of this title,** and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." [*Emphasis added]

The Great Northern states that as a result of the Commission's order it will suffer a minimum direct loss of $36,000.00 annually and a probable additional loss, through application of the lower joint rate to other mills, in excess of $115,000.00 per year. The Commission recognized this fact and made reference to it in its report 304 ICC at p. 497. But the fact that the order adversely affects the economic interests of the carrier is not grounds for denying the validity of it. *Seaboard Air Line Ry. Co. v. United States*, 131 F. Supp. 129 (E.D. Va. 1954) aff'd per curiam 349 U. S. 902, 75 S. Ct. 579, 99 L. Ed. 1239 (1955). The United States Supreme Court has observed that "self-interest of the carrier may not override the requirement of equality in rates." *United States v. Illinois Central Ry. Co.*, 263 U. S. 515, 524, 44 S. Ct. 189, 68 L. Ed. 417 (1923).

We have fully considered all of the arguments and contentions of the plaintiff and view them as being without merit. Our conclusion is that the Commission's order is based on adequate findings supported by substantial evidence in the record before it, and that the Commission properly exercised its authority under the law and that its action was not unreasonable, arbitrary, or capricious.

The plaintiff's complaint is dismissed and the temporary restraining order is discharged. A stay of 30 days is granted.

Dated: May 15, 1959.

Charles J. Vogel
United States Circuit Judge

Gunnar H. Nordbye
United States District Judge

Edward J. Devitt
United States District Judge

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action No. 4 59 Civ. 5

GREAT NORTHERN RAILWAY COMPANY, a corporation, Phaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

CENTENNIAL MILLS, INC.,
Intervening Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INJUNCTION PENDING APPEAL

The above-entitled matter came duly on for hearing before the court above named on Monday, the 22nd day of June, 1959, at 10:00 o'clock a.m., on the petition of the plaintiff for an injunction restraining and enjoining the enforce-

ment of the order of the Interstate Commerce Commission entered July 14, 1958, as thereafter amended, in its Docket No. 32015, *Preston-Shaffer Milling Company v. Great Northern Railway Company, et al.*, during the pendency of an appeal taken by the plaintiff herein to the Supreme Court of the United States from the final order of the court herein dated May 15, 1959. Plaintiff was represented by its counsel, Louis E. Torinus, Jr.; defendants United States of America and Interstate Commerce Commission were represented by C. Paul Jones, Assistant United States Attorney; and Centennial Mills, Inc., intervening defendant, was represented by its attorney, S. J. Wettrick. There were no other appearances. Upon all the files and records herein, including said petition for an injunction pending appeal, the affidavit attached thereto, and the affidavits and memoranda submitted by the parties on June 22, 1959, and full hearing and argument having been had, the court, being fully advised, makes the following findings of fact:

1. The Interstate Commerce Commission by Division 2 made its report and order in its Docket No. 32015, entitled "Preston-Shaffer Milling Company v. Great Northern Railway Company, et al.," dated July 14, 1958, wherein the said Commission ordered the plaintiff herein, Great Northern Railway Company, to establish upon not less than thirty (30) days' notice to the Commission and to the public, and thereafter to maintain and apply to the transportation of wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern Railway Company east and south of Cut Bank, Montana, including Cut Bank, Montana, to points in Oregon south of Portland and to points in California on the lines of the Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway

Company over the routes of the Great Northern Railway Company to Spokane, Union Pacific Railroad Company to Portland, Oregon, with transit at Milton-Freewater, Oregon, thence the Southern Pacific (in connection with The Atchison, Topeka and Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes: Said order dated July 14, 1958, was stayed pending disposition of a petition for reconsideration filed with said Commission subsequent to July 14, 1958. By order dated December 1, 1958, said Commission denied plaintiff's petition for reconsideration and modified said order of July 14, 1958, which had meanwhile been stayed pending disposition of said petition, so as to become effective January 16, 1959, without change in the requirements of said order. On January 13, 1959, plaintiff received telegraphic advice from the Commission that said order had been further modified so as to become effective February 16, 1959.

2. On January 15, 1959, this court made and filed herein its temporary restraining order restraining and enjoining the operation, application and effectiveness of said order of the Interstate Commerce Commission dated July 14, 1958, as theretofore modified, until the further hearing and order of this court herein. On January 19, 1959, said Commission entered its further order in said Docket 32015 reciting that "solely in obedience to said temporary restraining order" the effective date, operation and effectiveness of said order of the Commission, Division 2, dated July 14, 1958, as modified, be postponed and suspended until the further order of the Commission.

3. On May 15, 1959, this action for a permanent injunction enjoining, setting aside and annulling said order of the Commission, as amended, having been submitted to this court upon the pleadings, the briefs of the parties, and a hearing held before this court on April 7, 1959, at which the court received in evidence the record before the Interstate Commerce Commission in said Docket 32015, this court made and filed its memorandum decision and order dismissing the plaintiff's complaint, discharging said temporary restraining order and granting a stay of thirty days.

4. On June 12, 1959, plaintiff filed herein a notice of appeal to the Supreme Court of the United States from said memorandum decision and order of May 15, 1959, said notice of appeal being accompanied by proof of service on the several parties to this proceeding.

5. On June 12, 1959, this court filed herein its order dated June 11, 1959, setting for hearing on June 22, 1959, a petition by plaintiff for an injunction restraining and enjoining the enforcement of said Commission's order pending appeal, said order filed June 12, 1959, also providing that the stay which was granted on May 15, 1959, and hereinbefore referred to be extended and continued in effect until the hearing and determination of said petition for injunction pending appeal.

6. It appears from the affidavit of Ernest F. McGuire, copy of which is attached to said petition for an injunction pending appeal, that if said injunction is not granted, plaintiff will be required to establish by appropriate tariff publication the new through routes and joint rates described in said order of the Commission, that such action will result in a minimum loss of revenue to the plaintiff of $36,846 per year, and that this loss will be irretrievable. It appears from

the affidavit of Vincent P. Brown submitted June 22, 1959, that compliance with said order would result in complaints on the part of operators of numerous flour mills not located on the lines of plaintiff, for treatment equivalent to that accorded to the mill at Milton-Freewater referred to in the Commission's decision in its Docket 32015; that if such complaints were not resisted, plaintiff would sustain further substantial, irretrievable revenue losses; that plaintiff's 1958 traffic in grain and grain products produced $60,211,106 in freight revenue, of which $32,639,200 represented revenues from the transportation of wheat; and that in 1958, grain and grain product revenues constituted 26 percent of plaintiff's total system revenues from carload shipments for that year.

7. It appears from the affidavit of Moritz Milburn submitted June 22, 1959, that Centennial Mills, Inc., has thus far been able to retain its business in California by the substitution of billing; that this is becoming increasingly difficult and expensive; that unless the relief granted by said order of the Interstate Commerce Commission is made effective in the near future Centennial Mills, Inc., will be unable to retain this business, which will probably make it necessary to shut down its Milton-Freewater mill; that Centennial Mills, Inc., under present conditions, in order to obtain billing to ship to California, unloads wheat at Spokane originating on the Great Northern and reships such wheat to Milton-Freewater; that this operation at Spokane is inconvenient and costs approximately $10,000 per year plus storage expenses; and that because of the absence of joint rates to points in Oregon south of Portland, shipments to such points from Milton-Freewater have resulted in the assessment of freight charges higher by about $6,000 per year than would be the case if joint rates were available.

8. In the event plaintiff should comply with said order of the Interstate Commerce Commission pending appeal, it would be deprived of the protection against short-hauling provided in Section 15(4) were the Supreme Court to hold said order invalid and plaintiff thereupon attempted to cancel such compliance. In such event, in attempting to cancel the routes and rates required by said order, plaintiff would become subject to the provisions of Section 15(3) of the Interstate Commerce Act, which provides that if a through route or joint rate is sought to be canceled "without the consent of all carriers parties thereto or authorization by the Commission," the Commission may suspend such proposed cancellation and in such event the carrier proposing cancellation has the burden of proving such cancellation consistent with the public interest without regard to the provisions of Section 15(4). This circumstance, together with the circumstances described in the affidavits referred to in finding No. 6 herein, indicates that any revenue losses sustained by plaintiff as a result of compliance with the Commission's order might well continue to be experienced long after the termination of said appeal even if its appeal were successful, and constitutes a special reason why the order of the Commission ought not to become operative until its validity can be determined by the Supreme Court of the United States.

9. Plaintiff has filed with this court a bond conditioned to indemnify Centennial Mills, Inc., in the event of affirmance of this court's decision and order of May 15, 1959, or dismissal of its appeal, against the payment of freight charges pending appeal on the involved traffic in excess of charges which would become applicable were an injunction pending appeal not granted, and against the payment by

Centennial, pending appeal, of inspection, handling and storage charges at Spokane on wheat originating at the Montana points involved, unloaded at Spokane and reshipped to Milton-Freewater.

10. The injury which plaintiff would suffer from compliance with the said order of the Interstate Commerce Commission if this court's order of May 15, 1959, should finally be held invalid appears to be greater than any injury which defendants or the intervening defendant Centennial Mills, Inc., might suffer if this court's order were upheld and the operation and effectiveness of the Commission's order were stayed pending appeal upon the filing of the bond referred to in paragraph No. 9 hereof. The desirability in the public interest of avoiding disruption of existing rates and routing applicable to the grain traffic until the validity of the Commission's order shall be finally determined is also a factor which weighs against any considerations in favor of denying the injunction.

CONCLUSIONS OF LAW

1. Decision in this case depends upon a question of law on which there appears to be a conflict among the several district courts of the United States.

2. Considering all the circumstances set forth in the above findings, the court concludes that it should exercise its discretion by ordering the entry of an injunction restraining and enjoining the operation, application and effectiveness of said order of the Interstate Commerce Commission pending appeal, said injunction to continue until the final determination of said appeal or the further order of the court herein or of the United States Supreme Court.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's petition for an injunction pending appeal be, and it hereby is, granted and that the operation, application and effectiveness of said order of the Interstate Commerce Commission in its Docket 32015, *Preston-Shaffer Milling Company v. Great Northern Railway Company, et al.*, dated July 14, 1958, as thereafter modified, be, and they hereby are, restrained and enjoined pending plaintiff's appeal to the United States Supreme Court from the memorandum decision and order of this court dated May 15, 1959, and until final determination on such appeal and order pursuant thereto, unless and until otherwise ordered by this court or by the Supreme Court of the United States.

Dated this 24th day of July, 1959.

Charles J. Vogel
United States Circuit Judge
Gunnar H. Nordbye
United States District Judge
Edward J. Devitt
United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION

[304 I.C.C. 491]

No. 32015

PRESTON-SHAFFER MILLING COMPANY[1]

v.

GREAT NORTHERN RAILWAY COMPANY, ET AL.

Decided July 14, 1958.

Failure of defendants to establish joint rates on wheat and wheat products, in carloads, from origins in Montana to destinations in Oregon south of Portland and in California, over routes through Milton-Freewater, Ore., found unduly prejudicial and preferential. Basis for removal of unlawfulness prescribed.

S. J. Wettrick for complainant.

R. Paul Tjossem and *Robert F. Garing* for defendants.

[1] Predecessor in interest to Centennial Mills, Inc., Seattle, Wash., as explained in the report.

REPORT OF THE COMMISSION
DIVISION 2, COMMISSIONERS WINCHELL, MURPHY, AND MINOR.

BY DIVISION 2:

Exceptions to the report proposed by the examiner were filed by the complainant, and the defendants replied. We have heard the parties in oral argument. Our conclusions differ from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on June 19, 1956, the Preston-Shaffer Milling Company, a corporation then engaged in the operation of flour mills and adjoining elevators at Waitsburg, Wash., and Milton-Freewater and Athena, Ore., alleges that the combination rates[2] applicable on wheat and wheat products, in carloads, from Cut Bank, Mont., and stations in Montana east and south thereof on the Great Northern Railway Company,[3] to destinations in Oregon south of Portland, and in California on the Southern Pacific and the Santa Fe, over the route of the Great Northern to Spokane, Wash., the Union Pacific to Portland, and connections be-

[2]Rates and differences in rates are stated per 100 pounds, and are those in effect on October 1, 1956.

[3]The complete names of the railroads and the short names by which they will be referred to herein, are as follows: Great Northern Railway Company, as Great Northern; Union Pacific Railroad Company, as Union Pacific; The Atchison, Topeka and Santa Fe Railway Company, as Santa Fe; Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as the Milwaukee; Northern Pacific Railway Company, as Northern Pacific; and Southern Pacific Company, as Southern Pacific.

yond, with transit at Waitsburg, Milton-Freewater, and Athena, are unjust, unreasonable, unduly prejudicial [304 I.C.C. 492] to its mills, and unduly preferential of its competitors on other routes over which joint rates apply. We are asked to prescribe just, reasonable, and nonprejudicial joint rates for the future and, if necessary, to require the establishment of through routes under the provisions of section 15(3) and (4) of the Interstate Commerce Act.

During the progress of the proceeding, Preston-Shaffer sold its flour mill at Milton-Freewater to Centennial Mills, Inc., of Seattle, which has been operating the mill since May 1, 1957. Centennial also owns and operates flour mills at Spokane and Wenatchee, Wash., and at Portland. Centennial originally participated in this proceeding in support of the Great Northern, but because of the change in interest it now adopts the testimony of Preston-Shaffer, and, upon request, it has been substituted as the complainant herein. The flour mills at Waitsburg and Athena are no longer operating, and the allegations with respect to those points will not be further considered.

Since 1925, with the development of large bakeries and the trend toward commercial production of bread, flour mills in the Pacific Northwest have been active in the California market, where the deficit flour production amounts to about 9 million hundredweight annually. The mill at Milton-Freewater is located in northeastern Oregon and is served by the Union Pacific and Northern Pacific. It has a capacity of 2,400 hundredweight of flour per day. Since about 1947 it has been used primarily in the milling of flour for California commercial bakeries. Prior to that time, Preston-Shaffer supplied those bakeries from a mill at Pendleton, Ore. When the latter mill was destroyed by fire in 1947,

the production of bakery flour moved to the other mills, which prior to that time were used generally for the production of family flour.

Wheat produced in Washington, Oregon, and Idaho is not generally suitable for milling into bakery flour; in 1955, soft white wheat, used for pastry and cake flour, amounted to about 90 percent of the total wheat production in those States. Most of the wheat grown in Montana is either so-called hard winter or hard spring wheat. Hard winter wheat is generally used for family flour. Hard spring wheat has a higher protein content and a higher gluten quality, which produces flour able to withstand handling in the bakeries and to provide a large loaf volume. In recent years the commercial bakeries have insisted upon specifications in their flour orders which require the milling of hard spring wheat. All bakery flour is milled from varying proportions of such wheat.

Western millers obtain their supply of wheat for bakery flour generally from the central and north central areas of Montana, the freight rates from these areas being lower to the Pacific Coast than to Minneapolis and Duluth, Minn., the eastern markets. About 79 percent [304 I.C.C. 493] of Montana spring wheat originates in the north or north central areas adjacent to the lines of the Great Northern, and the remainder is produced along the lines of the Milwaukee. From 1950 to 1955, about 280 million bushels of wheat were produced in central Montana, or an annual average of 46 million bushels, about equally divided between the winter and spring varieties. However, during that period a significant change developed. Hard spring wheat declined from 26.3 million bushels in 1950 to 13.4 million bushels in 1955, and from 59 to 27 percent of total harvested acreage, while

during the same period hard winter wheat increased from 12 million to 42 million bushels, and from 31 to 73 percent of the total acreage. The shift in production was due to the better resistance of winter wheat to winter damage, and its greater average yield which more than offsets the higher prices paid for spring wheat.

Formerly, Preston-Shaffer obtained from 35 to 52 percent of its spring-wheat requirements from origins on the Milwaukee. However, in recent years the production of spring wheat has been largely concentrated in the more northerly areas adjacent to the lines of the Great Northern, and in the 1955-56 crop year Preston-Shaffer was able to obtain only about 9 percent of its requirements from Milwaukee origins. There have been instances, particularly during 1955, when Pacific Northwest flour mills had to purchase spring wheat in northeastern Montana from which the freight rates to the Pacific Coast are higher than to the eastern markets. Joint rates from origins on the Great Northern in eastern Montana over routes via the Milton-Freewater mill are also sought in this proceeding.

Rates on wheat and wheat products from Montana origins to Pacific Coast points were prescribed in *Grain and Grain Products*, 205 I.C.C. 301 and 215 I.C.C. 83. From the central and north central areas of Montana, a base rate of 39 cents was prescribed to North Pacific terminals, including Portland, which with subsequent general increases has become 72 cents. It applies from Montana origins on the Great Northern to Portland over the route of the originating carrier to Spokane and the Union Pacific beyond. Transit is accorded under that rate at Milton-Freewater. However, when traffic originated at those Montana points and transited at Milton-Freewater moves to destinations in Oregon south of Portland

and in California, the rates from Portland to the destinations are added to the 72-cent rate. To San Francisco, for example, the rate from Portland is 77 cents, resulting in a combination rate of $1.49, and to Los Angeles the combination is $1.77.

While at the time of the cited proceeding, joint rates were published from Montana to California only over routes through Seattle, Wash., and Portland to afford the originating carriers their long [304 I.C.C. 494] hauls, the carriers were required to establish the joint rate of 65 cents prescribed therein also over the short routes through Butte, Mont. Routes from the Montana origins via Spokane, Milton-Freewater, and Portland to California were not considered therein, but subsequently the Northern Pacific and Milwaukee established joint rates over those routes from Montana origins on their lines. With the addition of subsequent general increases, the 65-cent rate has become $1.185, and that is the present joint rate from the Montana origins to both San Francisco and Los Angeles over through routes provided in the tariffs. It is 30.5 and 38.5 cents less than the assailed combination rates to those respective points. To Oregon destinations south of Portland, the combinations exceed the joint rates by amounts ranging from 7 cents at Salem to 15.5 cents at Klamath Falls.

The distances from Chester, Mont., as a representative origin, over the lines of the Great Northern to Spokane, the Union Pacific (via Milton-Freewater) to Portland, and the Southern Pacific beyond, are 1,639 miles to San Francisco and 2,012 miles to Los Angeles. Over the route of the Great Northern to Chemult, Ore., and the Southern Pacific beyond, the distances are 1,435 miles to San Francisco and 1,808 miles to Los Angeles, and over the Great Northern to Port-

land and the Southern Pacific beyond they are 1,701 and 2,074 miles, respectively. The distances over the route via Milton-Freewater thus compare favorably with those over existing through routes, and no material difference in operating conditions over any of these routes is indicated.

Prior to World War II, Preston-Shaffer obtained the necessary grain in Montana. It was milled in transit, and the flour was shipped to Portland under the joint rail rates, and from Portland by water to California destinations. From 1938 to 1941, the rail-water rates from Montana to San Francisco and Los Angeles were lower than the all-rail rates from and to the same points. During World War II, the water service was discontinued, but the water-competitive port-to-port rail rates between Portland and California were continued in effect until September 1, 1947, when this Commission withdrew fourth-section relief for the maintenance of those rates, and thereafter the normal rail rates applied.

Following the cancellation of the port-to-port rail rates, Preston-Shaffer requested the Great Northern to establish the joint rates over routes via its mills, but further negotiations were delayed pending a final decision in *General Mills, Inc. v. Great Northern Ry. Co.*, 269 I.C.C. 457, sustained in *Great Northern Ry. Co. v. United States*, 81 F. Supp. 921, 336 U. S. 933. In that proceeding, the Great Northern maintained through routes and joint rates on wheat and wheat products from points on its lines in central Montana through Butte to [304 I.C.C. 495] points in California. When transit was accorded at Great Falls, Mont., an intermediate point over those routes, the defendant collected charges based on combination rates. On the same route, milling in transit was permitted by other lines at points south of Butte. The failure

to establish transit privileges at Great Falls in connection with the established joint through rates to and from the considered points over routes through Butte was found unreasonable and unduly prejudicial. Following the decision in that proceeding, negotiations were resumed, but after the Great Northern advised that it would not join in the publication of the joint rate over the route sought via Milton-Freewater, the present complaint was filed.

The assurance of continued access to the California market is the objective of the complainant. Preston-Shaffer's sales to California bakeries ranged from 922,000 hundredweight in 1951 to 1,018,000 hundredweight in 1955, and averaged about 70 percent of its total production. It was able to continue its sales in California and even increase them slightly, despite the rate disparity, by the substitution of tonnage or switching of billing. This practice, permitted by appropriate tariff provisions, enables the miller by surrender of the inbound billing to take an allowance equal to the freight charges paid on the movement of grain from any origin to the transit point, and to ship the milled product beyond the transit point at the remainder or balance of the rate applicable from the origin of the grain for which billing is surrendered to the ultimate destination of the milled product.

To secure the most favorable freight charges on flour moved from Milton-Freewater to destinations south of Portland, even though milled from grain originated at origins on the Great Northern, Preston-Shaffer would surrender billing for grain originated at other points from which joint rates applied, such as those in Montana on the Milwaukee or at points in Washington and Oregon where the company purchases white wheat.

Flour movements from Milton-Freewater to California points south of Stockton and San Jose have been limited by the amount of wheat originated by Preston-Shaffer at the Milwaukee origins in Montana. On flour movements to northern California destinations, Preston-Shaffer surrendered billing on grain from origins in Washington and Oregon. Because an increasing proportion of its wheat requirements moved from Montana origins on the Great Northern, there was an insufficient amount of substitute billing to move flour to California destinations at charges competitive with mills having available the joint through rates. A further complication has been the disposition of inbound billing on grain from origins on the Great Northern. From July 1, 1955 to June 30, 1956, Preston-Shaffer purchased some 55 million pounds of wheat at Great Northern origins. The billing [304 I.C.C. 496] on 37 million pounds was used to move flour and mill feed to Portland and adjacent points to which joint rates were applicable, and the balance was about equally divided between export shipments of flour and wheat through North Pacific ports.

On some shipments of flour and mill feed, Preston-Shaffer was compelled to pay the combination rates over Portland because of a lack of the necessary billing. These movements were restricted to destinations in Oregon to which the difference between the combinations and the joint rates was comparatively small. During the crop year 1955-1956, it shipped some 8 million pounds of flour and mill feed to southern Oregon destinations, on which it paid approximately $6,000 more in transportation charges than it would have paid if billing had been available to enable it to move that tonnage at the joint rates. No shipments were made

to California destinations on which the combination rates over Portland were paid.

Although the complainant operates mills located on routes over which the joint rates are applicable, it pursues the objectives originally sought by Preston-Shaffer because the Milton-Freewater mill is engaged largely in the milling of bread flour for the California bakeries. An important consideration in acquiring that mill was the fact that, unlike the complainant's other mills, it is equipped to load cars with bulk flour. Since handling in bulk form is more economical, some of the large California bakeries are converting their operations to receive flour in that manner, and it is expected to become the common practice.

The Great Northern maintains that it will lose substantial revenue if required to establish through routes and joint rates via Milton-Freewater. Of the flour sold by Preston-Shaffer in California during 1955-1956, the volume made from Montana spring wheat is estimated at 39,660 tons. Distributing those tons to California destinations in the same ratios as the tons terminated at those destinations bore to the total tons of wheat and flour from Montana to California in the year 1955, the Great Northern estimates that its revenue from the present joint rates for the haul to Portland would be $506,774, or $12.77 a ton. Out of the present joint rates from origins to Portland via Spokane, its estimated revenue on 39,660 tons is $347,422, or $8.76 a ton. The average distances from origins in Montana having an annual wheat production of a half million bushels or more are 1,016 miles to Portland and 503 miles to Spokane. The distance from Spokane to Portland is 370 miles, or about 42 percent of the total average distance via Spokane to Portland. The Southern Pacific would retain its share of the joint rates beyond

Portland. Division of the revenue to Portland on a mileage prorate basis, at the above estimations, would result in 58 percent of $506,774 or $293,931 accruing to the Great Northern, the [304 I.C.C. 497] equivalent of $7.41 a ton. The loss to the Great Northern, measured by the difference between its share of the present joint rates from origins via Spokane to Portland and of its share of the joint through rates sought via Spokane to the California destinations, as computed above, would amount to $1.35 a ton. In addition, it fears additional losses from extensions of the joint rate which might be sought in the future by other mills.

While the complainant takes the position that through routes presently exist from the Montana origins to the considered destinations and that we can require the application of the joint rates without regard to section 15(3) and (4), alternatively it maintains that the evidence warrants the prescription of through routes under those provisions. As stated in *Thompson v. United States*, 343 U. S. 549, the existence of a through route depends upon the circumstances of the particular case, and that (page 557): "In short, the test of the existence of a 'through route' is whether the participating carriers held themselves out as offering a through transportation service." The evidence shows that the originating carrier's traffic officials have refused to accede to several requests for the establishment of the joint rates over routes through Milton-Freewater, and that course of action strongly indicates that there is no holding out to perform through service over such routes. Nor do the shipments made by the complainant at the combination rates to Oregon destinations south of Portland establish such holding out. In *Denver & R. G. W. R. Co. v. Union P. R. Co.*,

351 U. S. 321, 329, a limited movement at higher combination rates was held to be insufficient evidence of the existence of through routes.

Section 15(3) empowers us to establish through routes and joint rates whenever deemed by us "to be necessary or desirable in the public interest." The Great Northern contends that under that section we must determine that there is some "actual necessity" or some "compelling reason" to find that the sought through routes are in the public interest. In this connection it is pointed out, and it was observed in the proposed report, that no representatives of either the California commercial bakeries or of the Montana wheat producers, groups which the complainant asserted would be benefited, offered evidence that the present routes are inadequate or that the relief sought is needed. In *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I.C.C. 333, upheld by the Supreme Court in *Pennsylvania R. Co. v. United States*, 323 U. S. 588, it was stated, at page 338:

> The Pennsylvania also contends that the routes sought are not "necessary and desirable" in the public interest because of the fact that "the complaint was not supported by any shipper of grain or its products at points of origin, by any receiver of mixed feed at destinations or by producers or consumers of grain in the Cumberland Valley" and because of the fact that "upon the record there [304 I.C.C. 498] is no basis for assuming that any of these are dependent upon the transit operation being performed at Hagerstown."

In *Cancelation of Rates and Routes via Short Lines*, 245 I.C.C. 183, the Commission said: "The words 'necessary and desirable' do not in either case connote indispensability."

In *Flory Milling Co. v. Central New England Ry. Co.*, 93 I.C.C. 129, the Commission said, at page 133:

> It is true that no producers of the inbound commodities, retailers of complainant's products, or ultimate consumers appeared at the hearing to testify that they would be benefited by the joint rates asked. It may also be true that retailers and consumers encounter no great difficulty in securing an adequate supply of grain products and mixed feeds from mills located on established routes over which joint rates with transit apply. But an individual shipper is entitled to the reasonable use of existing transportation facilities at reasonable rates, rules, and regulations measured in the light of the business and transportation practices in the industry in which he is engaged.

There is no dispute that the marketing of flour is a highly competitive business. The evidence shows that hard spring wheat is essential to the milling of flour which meets the specifications of the commercial bakeries, and that the producing region of hard spring wheat has been receding to the Montana area served by the Great Northern. Although the complainant's predecessor had been able to remain competitive at points in this destination territory by resorting to the substitution of billing, the changing production picture is making that procedure most difficult by limiting available billing and causing an accumulation of billing which cannot be used to ship flour to those destinations at rates comparable to the joint rates available to its competitors. In addition to the close surveillance of all inbound billing which the complainant has been compelled to practice, during the last crop year it leased space at Spokane

where about 250,000 bushels, delivered on Great Northern billing, were stored and later shipped out on billing which could be used to reach the considered destinations. It is estimated that the transaction cost the complainant $10,000 in addition to storage charges. In these circumstances, we conclude that the continued refusal of the Great Northern to concur in the publication of joint rates from origins on its lines through Milton-Freewater to destinations in Oregon beyond Portland and in California, with transit at Milton-Freewater, is and will be unduly prejudicial to the mill of Milton-Freewater and unduly preferential of competing mills located on routes presently enjoying the joint rates.

As previously observed, the Great Northern presently participates in joint rates via Milton-Freewater as far as Portland. By extending its participation in joint rates to this destination territory, the unlawfulness herein found to exist will be removed. Our authority to prescribe the manner of removing such unlawfulness was sustained [304 I.C.C. 499] in *New York v. United States*, 331 U. S. 284, 340-341, and *Ayrshire Collieries v. United States*, 335 U. S. 573, 593-594.

We find that the failure of the defendants to establish joint rates on the described traffic over routes through Milton-Freewater, with transit at that point, is unduly prejudicial to the complainant's mill there located and unduly preferential of competitors' mills located on routes over which joint rates presently apply. We further find that it is necessary and desirable in the public interest that the unlawfulness thus found to exist be removed by the estab-

lishment of the latter joint rates over routes via Milton-Freewater, with transit at that point.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 14th day of July, A. D. 1958.

No. 32015

PRESTON-SHAFFER MILLING COMPANY

v.

GREAT NORTHERN RAILWAY COMPANY, ET AL.

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 23, 1958, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of wheat and wheat products, in carloads, from points in Montana described in the succeeding para-

graph hereof to points in Oregon south of Portland, Ore., and to points in California, rates which exceed those on the basis prescribed in the next succeeding paragraph:

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 23, 1958, upon not less than 30 days' notice to this Commission and to the general public in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of wheat and wheat products, in carloads, from points in Montana on the lines of the Great Northern Railway Company east and south of Cut Bank, Mont., including Cut Bank, to points in Oregon south of Portland and to points in California on the lines of the Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company, over the routes of the Great Northern Railway Company to Spokane, Wash., Union Pacific Railroad Company to Portland, Ore., with transit at Milton-Freewater, Ore., thence the Southern Pacific Company (in connection with The Atchison, Topeka and Santa Fe Railway Company to destinations on the lines of the latter carrier), rates which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. 32015

PRESTON-SHAFFER MILLING CO.[1]

v.

GREAT NORTHERN RAILWAY COMPANY, ET AL.

Decided ———————

1. Rates on wheat and wheat products, in carloads, from origins on the lines of the Great Northern Railway Company in Montana to destinations in Oregon south of Portland and in California over routes through Milton-Freewater, Ore., not shown to be unreasonable or unduly prejudicial.
2. Through routes and joint rates on wheat and wheat products, in carloads, from origins on the lines of the Great Northern Railway Company to destinations in Oregon, south of Portland and in California through Milton-Freewater, Ore., for transit found not shown to be necessary or desirable in the public interest. Complaint dismissed.

S. J. Wettrick for the complainant.

R. Paul Tjossem and *Robert F. Garing* for the defendants.

[1] As described in the report, Centennial Mills, Inc., Seattle, Wash., is successor in interest to the indicated complainant.

REPORT PROPOSED BY EDWARD L. BOISSEREE, EXAMINER

Complainant corporation alleges by complaint filed June 19, 1956, that the combination rates[2] applicable on wheat and wheat products, in carloads, from stations on the defendant Great Northern Railway Company in Montana to destinations in Oregon south of Portland and in California over the route of the Great Northern[3] to Spokane, Wash., Union Pacific to Portland, and connections beyond, with transit at Waitsburg, Wash., Milton-Freewater and Athena, Ore., are unreasonable and unduly prejudicial. The Commission is asked to prescribed reasonable, nonprejudicial joint rates for the future and, if necessary, establish through routes under the provisions of section 15(3) and (4) of the act.

When the complaint was filed, the complainant owned and operated flour mills and adjoining elevators at Waitsburg, Milton-Freewater and Athena. Evidence was submitted by the complainant at the initial hearing, in October of 1956, but the defendant Great Northern, the only defendant to appear in opposition to the complaint, was granted an extension of time to March 1, 1957, to complete preparation of its evidence in reply. Complainant was authorized to file evidence in rebuttal by March 20, 1957. By stipulation this

[2]Rates are stated in amounts per 100 pounds and are those in effect October 1, 1956.

[3]The names of the defendants and other railroads with the abbreviations used herein are as follows: The Great Northern Company, Great Northern; Union Pacific Railroad Company, Union Pacific; Southern Pacific Company, Southern Pacific; The Atchison, Topeka and Santa Fe Railway Company, Santa Fe; the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Milwaukee; and The Northern Pacific Railway Company, Northern Pacific.

further presentation was submitted in the form of verified statements. Subsequent to the receipt of this further evidence but prior to the filing of briefs the parties requested additional time to make a supplemental showing as to the current ownership of the indicated flour mills. Verified statements were received from the parties in June and briefs were filed July 15, 1957.

The record as now constituted shows that the complainant corporation sold its flour business and the flour mill at Milton-Freewater to the Centennial Mills, Inc., of Seattle, Wash., in April 1957 and that the latter company has been operating the mill since May 1 of this year. Centennial Mills, Inc., also owns and operates flour mills at Spokane, and Wenatchee, Wash., and Portland, Ore., and its traffic manager originally participated in this proceeding as a witness for the defendant Great Northern. Because of its change in interest, this company now adopts the testimony of the title complainant and asks that it be substituted as complainant; and that the prayer of the complaint be granted with respect to rates applicable over routes via Milton-Freewater. The mills at Waitsburg and Athena have ceased operations as flour mills and allegations in the complaint with respect to these mills will not be further considered. The defendants have no objection to the substitution of Centennial Mills, Inc., as complainant and that term as used subsequently herein will have reference only to this company.

The mill at Milton-Freewater is located in northwestern Oregon and is served by the Union Pacific and Northern Pacific. It has a capacity of 2,400 hundred weight of flour per day. Since about 1947 this mill has been used largely for the milling of flour for the commercial bakeries of Cali-

fornia. Prior to that time, the Preston-Shaffer Company supplied flour to the California bakeries from a mill that it owned and operated at Pendleton, Ore. The latter mill was destroyed by fire in 1947 and the production of the bakery flour moved to the other mills which prior to that time were used generally for the production of family flour. Since 1925, with the development of the large bakeries and the trend toward commercial production of bread, the flour mills in the Pacific Northwest have been active in the California market. That State with its increasing population, particularly in the larger cities, and its deficit in the production of flour was a principal market for the Preston-Shaffer Company and other mills in the Pacific Northwest.

Prior to World War II, the mills of the Preston-Shaffer Company that supplied flour to these bakeries obtained the necessary grain in Montana. The grain was milled in transit and the flour shipped to Portland under the joint rail rates applicable from the Montana origin to that destination. From Portland, the flour was shipped by water transportation to California destinations under the comparatively low coastwise steamship rates. For the period from 1938 to 1941, the rail-water rates from Montana to San Francisco and Los Angeles were lower than the all-rail rates from and to the same points. During World War II, the water service was discontinued but the water competitive port-to-port rail rates between Portland and California were continued in effect until September 1, 1947, when orders of this Commission withdrawing fourth section relief to maintain such rates became effective. At this point, the normal rail rates from Montana origins to California became effective. Over routes via Milton-Freewater, the normal rates from origins on the Great Northern are, as hereinafter described, the combina-

tion of the rate from origins to Portland with the rate applicable from that point to final destination. Such rates are somewhat higher than the joint rate applicable from the same origins to California over other routes.

Rates on wheat and wheat products from Montana origins to the Pacific Coast were originally prescribed by the Commission in *Grain and Grain Products,* 205 I.C.C. 301, 215 I.C.C. 83. From the Central Montana group including central and north central areas of the State, a rate of 39 cents was prescribed to North Pacific Coast terminals such as Portland. The present rate as a result of subsequently authorized increases is 72 cents. That rate is applicable from Montana groups origins on the Great Northern to Portland via the route of the originating carrier to Spokane and the Union Pacific beyond. Transit is extended under that rate at complainant's mill at Milton-Freewater. On traffic destined to California as well as points in Oregon south of Portland, the joint rate from the same Montana origins is not applicable over the route just described and connections beyond Portland. On traffic from these Great Northern origins to San Francisco and Los Angeles, for example, the joint rate fixed in *Grain and Grain Products, supra,* was 65 cents and with the increases subsequently authorized is now $1.185. The joint rate was required to be published only over routes via designated Washington and Oregon gateways and via Butte, Mont. On grain stopped at complainant's Milton-Freewater mill and later moved through Portland to destinations beyond to the south in Oregon or in California the applicable rate from central Montana origins on the Great Northern is a combination of the 72 cent rate to Portland and the published rate from the latter point to final destination. To San Francisco the rate from Portland is 77 cents so

the total rate from the Great Northern origin in central Montana via Milton-Freewater is $1.49 or 30.5 cents more than the joint single-factor rate of $1.185 applicable over the other routes indicated.

In 1948, following the cancellation of the reduced rail port-to-port rates from Portland to the California destinations, the Preston-Shaffer Company sought an adjustment of rates through an appeal to the Great Northern to apply the joint rates over routes via its mills. Further negotiations were delayed pending a final decision in *General Mills Inc. v. Great Northern Ry. Co.*, 269 I.C.C. 457. In the indicated proceeding decided December 19, 1947, the Great Northern's failure to establish transit provisions at Great Falls, Mont., in connection with the through rates on wheat and wheat products from Montana via routes through Butte, Mont., to destinations in California and Nevada was found to be unreasonable and unduly prejudicial. An appeal was taken by the Great Northern and the report of the Commission was sustained in *Great Northern Ry. Co. v. United States*, 81 F. Supp. 921, 336 U. S. 933. Negotiations between the parties were resumed in May 1956 and the Great Northern advised the Preston-Shaffer Company that it would not join in the publication of the joint rate over the route sought. The present complaint was instituted as a result of such action.

From Montana origins located on the Milwaukee and Northern Pacific the joint rates are applicable over routes via complainant's mill at Milton-Freewater to the considered destinations. The following table compares the rates applicable from representative origins in central Montana on such railroads with those applicable from Chester on the Great Northern over routes of movement via Milton-Freewater and competitive transit points to San Francisco and Los Angeles.

From	*To*	*Route*	*Transit Point*	*Rate*
Chester, Mont.,	San Francisco) Los Angeles)	GN-Portland-SP	Seattle	$1.18½
Chester, Mont.,	San Francisco) Los Angeles)	GN-Butte-UP Ogden-UP/SP	Ogden	1.18½
Chester, Mont.,	San Francisco) Los Angeles)	GN-Spokane-UP-Portland-SP	Milton-Freewater "	1.49 1.77
Three Forks, Mont.,	San Francisco) Los Angeles)	NP-Portland-SP	Milton-Freewater "	1.18½ 1.18½
Great Falls, Mont.,	San Francisco) Los Angeles)	MILW-Spokane-UP-Portland-SP	Milton-Freewater "	1.18½ 1.18½

Abbreviations: GN, Great Northern; SP, Southern Pacific; UP, Union Pacific; NP, Northern Pacific; MILW, Milwaukee.

To Oregon destinations south of Portland the situation is similar to that reflected in the above table. Joint rates are applicable to such points from Montana origins on the Northern Pacific and Milwaukee via complainant's mill at Milton-Freewater but higher combination rates are applicable from the Great Northern origins. The latter rates exceed the joint rates by amounts ranging from 7 cents on movements to Salem to 15.5 cents on movements to Klamath Falls.

At the time of the decision in *Grain and Grain Products, supra*, the joint rates did not apply from Montana origins to California destinations over routes through Butte, Mont., and Ogden, Utah, but only over the routes through Seattle and Portland in order to give the originating railroads their long haul. In that proceeding, the Commission required the establishment of the rates over the short routes through Butte. It did not order the establishment of the joint rates over the routes here sought. Subsequently, the Northern Pacific and the Milwaukee made the joint rates applicable via routes from Spokane to Portland via Milton-Freewater. To Portland and other North Pacific Coast Terminals, the prescribed joint rates from Montana are effective over the route of the

Great Northern to Spokane and Union Pacific beyond. But if the shipments move beyond Portland to the south, then the combination rates over Portland is the applicable rate on any particular shipment.

The wheat produced in Washington, Oregon, and Idaho is not generally suitable for milling into bakery flour. In 1955, the soft white wheat used for pastry and cake flour amounted to about 90 percent of the total wheat production in those States. Montana produces two kinds of wheat in volume. The hard winter wheat is generally used for family flour and the hard spring wheat grown most extensively in the central, north central and northeastern sections of Montana is primarily used to mill flour for commercial bakeries. The latter wheat has a higher protein content and a higher or stronger gluten quality which gives strength to the flour and enables it to withstand abuse and provide a large load volume. Many if not all of the flours contain blends of wheat but all of the bakery flour is milled from varying proportions of the hard spring wheat. In recent years, the commercial bakeries have insisted upon specification in their flour orders that make milling of the hard spring wheat essential.

Western millers obtain their supply of wheat for bakery flour generally from central and north central areas of Montana. The freight rates from these areas are lower to the Pacific Coast than to Minneapolis and Duluth, Minn., the eastern markets. The major portion of the spring wheat originates in areas adjacent to the lines of the Great Northern, particularly in the north central area of Montana, although there is some production along the lines of Milwaukee. The six-year average wheat production in central Montana, 1950 to 1955, was some 46 million bushels about equally

divided between winter and spring varieties of wheat. However, since 1950, there has been a substantial change. The spring wheat variety has declined from about 69 percent of the total harvested acreage in 1950 to only 27 percent in 1955, while the harvested acreage of winter wheat had a corresponding increase from 31 percent in 1950 to 73 percent in 1955. The production resulting from this harvested acreage shows a corresponding change. The spring wheat production declined from 26.3 million bushels in 1950 to 13.4 million bushels in 1955. Concurrently, the production of winter wheat increased from 12 million bushels in 1950 to 42 million in 1955.

The indicated shift in production was primarily due to the fact that winter wheat varieties are better able to withstand winter damage and, more importantly, the greater average yield of winter wheat more than offsets the higher prices paid for spring wheat. The defendant Great Northern originates about 79 percent of the hard spring wheat in the central and north central Montana. The remainder originates on the Milwaukee. In earlier years the Preston-Shaffer Company moved from 35 to 52 percent of its spring wheat requirements from origins on the Milwaukee. However, in recent years the production of the spring wheat has been largely concentrated in the more northerly areas in Montana adjacent to the lines of the Great Northern and that company was able during the 1955-56 crop year to procure only about 9 percent of its spring wheat requirements from Milwaukee origins. There has been certain instances, particularly during 1955, when the Pacific Northwest flour mills had to make spring wheat purchases in northeastern Montana where the freight rates to the Pacific Coast are higher than they are to the eastern markets. Joint rates from

this section of Montana to California over routes via the Milton-Freewater mill are also sought by the instant complaint but in most years all western purchases of the spring wheat are made in the Central Montana group.

A continuing ability to sell flour in the California market is the real basis for this complaint. Preston-Shaffer's sales to California bakeries in the past five years averaged about 70 percent of its total output. California consumes substantially more flour than it produces while the reverse is true as to Washington, Oregon, Montana, and Utah. The annual deficit in California is about nine million hundred weight. Preston-Shaffer sales in California have ranged from 922,000 hundred weight in 1951 to 1,018,000 hundred weight in 1955. That company was able to continue its sale in California and even increase them slightly despite the indicated rate disparity through substitution or switching of billing. This practice, permitted by appropriate tariff provisions, enables the miller to take an allowance for the rail freight charges paid on the movement of the grain to the mill or transit point and ship the milled product beyond the transit point at the remainder or balance of the rate applicable from the origin point of the grain to the destination point of the milled product. Billing of the Great Northern on grain originated at its Montana origins does not permit the movement of the flour or milled product beyond Milton-Freewater at the balance of the joint rate applicable from origin to destinations in Oregon south of Portland and in California. On flour moving to such points from Milton-Freewater even though milled from grain originated at the Great Northern origins, the Preston-Shaffer Company would surrender billing covering grain originations at other points, such as on the Milwaukee or origins in Washington and Oregon where

the company purchases white wheat, in order to move the milled product at the most favorable freight charges.

Flour movements to California points south to Stockton and San Jose from Milton-Freewater were limited by the amount of wheat originated by Preston-Shaffer at Milwaukee origins in Montana. On flour movements to northern California destinations the company surrendered billing on wheat moving inbound to the mill from Washington and Oregon destinations. As indicated, joint rates were applicable from these origins through Milton-Freewater. The Preston-Shaffer Company had encountered difficulty in making this substitution of billing on its outbound movements of flour to the indicated destinations because an increasing proportion of its wheat requirements came from origins on the Great Northern in Montana and as a result there was an insufficient amount of [illegible] billing to move the flour to California destinations at charges competitive with other mills. A further obvious complication is the disposition of the outbound tonnage represented by the inbound billing from the Great Northern origins. From July 1, 1955 to June 30, 1956, Preston-Shaffer Company purchased some 55 million pounds of wheat at Great Northern origins. On that tonnage, it used the billing on 37 million to move flour and mill feed to Portland and adjacent points to which the joint rate was applicable. The billing on the remaining 18 million pounds was about equally divided between export shipments of flour and wheat through North Pacific ports.

On some shipments of flour and mill feed, the Preston-Shaffer company was compelled to pay combination rates over Portland because of a lack of the necessary billing. These were restricted to movements to Oregon destinations where the difference between such rates and the joint rate

was comparatively small. During the crop year 1955-56, it shipped some eight million pounds of flour and mill feed to southern Oregon destinations on which it paid approximately $6,000 in transportation charges more than would have been due if billing had been available to enable it to move the tonnage at the balance of the joint rate. No shipments were made to California destinations on which the combination rates over Portland were paid.

The subsequent change in ownership of the flour mill at Milton-Freewater, the abandonment of the other two mills, and the substitution of Centennial Mills, Inc., as complainant changes the situation somewhat. The present complainant has mills located on the Great Northern at Spokane and Wenatchee, Wash., and at Portland, Ore., and the joint rates sought by the original complainant are applicable on wheat moving from Montana, Great Northern origins via such mills. Complainant pursues the objectives originally sought, however, because the Milton-Freewater mill is engaged almost exclusively in the milling of bread flour for the California bakeries and this mill is equipped to load cars or bulk shipment of flour. Complainant's other mills are not equipped to handle such shipments and this was assertedly an important consideration in buying the mill from Preston-Shaffer. In any event, the fact that it has other mills which can ship to the California markets at the joint rates applicable from origin of the wheat is no reason, accordingly to complainant, for not providing the mill at Milton-Freewater with the same privilege.

Generally, it is the position of the complainant that through routes presently exist from Montana origins via the Great Northern to Spokane, Union Pacific to Portland, Santa Fe or Southern Pacific beyond and that application of the

joint rates sought over such routes can be authorized under section 1 and 3 of the act. Complainant also submits that the evidence of record warrants findings that such through routes and joint rates should be established under the provisions of section 15(3) and (4) of the act, and it ask the Commission to so find. The defendant Great Northern is of the view that through routes do not presently exist; that the gateway of Spokane is commercially closed to complainant's mill at Milton-Freewater on grain originating on its lines in Montana; and that the issues herein are necessarily restricted to the establishment of through routes and joint rates under sections 15(3) and (4). This carrier has continually refused to join in the establishment of joint rates beyond Portland over the routes sought because the movement of wheat from origins on its lines via such routes would materially reduce the length of its haul. Participation in routes and rates from origins in Montana on its lines to Portland via Milton-Freewater and to California destination via Butte were established by action of the Commission. The Great Northern strongly adheres to the policy of holding traffic it originates to a movement on its lines for the greatest possible segment of the total transportation service.

It is contended by complainant that the existence of through routes from and to the considered areas are established by the fact that through routes and joint rates are maintained in connection with the Great Northern over all routes via Portland except over the one serving its Milton-Freewater mill; that such routes are presently in effect from Montana origins on the Milwaukee and Northern Pacific; and that through shipments have been made during 1955 and 1956 via the route of Great Northern to Spokane, Union Pacific to Portland, and Santa Fe or Southern Pacific beyond to destinations in southern Oregon.

As indicated by complainant, the existence or nonexistence of a through route is a factual question to be resolved upon the circumstances of the particular case. Recent proceedings before the Commission and the Courts have set the standard for the determination as to whether a through route exists. In *Denver & R. G. W. R. Co. v. Union P. R. Co*, 351 U. S. 321, the Court stated at page 327:

> In considering the question of through routes under 15(4) we begin with our recent holdings and opinions in *Thompson v. United States*, 343 U. S. 549; *United States v. Great Northern R. Co.*, 343 U. S. 562. We there emphasized the purpose of 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunk-line "short-hauls" without faithful observance of restrictive conditions imposed by that section. At the same time we recognized that Commission action is not necessary to the creation of through routes. We pointed out that a through route is ordinarily a voluntary arrangement, express or implied, between connecting carriers, and that the existence of such an arrangement depends upon the circumstances of particular cases. We said in *Thompson v. United States, supra*, at 557, that "in short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering a through transportation service".

As stated by the Court, the test is whether there is a "holding out" express or implied by the participating carriers to perform the through service. Here the facts do not show such a holding out by the Great Northern. There is, on the contrary, a course of action by that carrier that leads to an

opposite conclusion. It refused to join in the application of the joint rates over such route initially and through the maintenance of the higher combination of rates attempted to deter the movement of any wheat tonnage over routes which would result in short hauls for it. Evidence submitted by complainant shows that Great Northern's traffic officials refused to accede to several requests to permit the movement of the wheat from origins on its line via complainant's mill at the joint rates applicable over other routes where the carrier retained its long haul. Compare *Chicago M. St. P. & P. R. Co. v. Spokane, P. & S. Ry. Co.*, —— I.C.C. —— decided May 10, 1957.

The indicated movement to southern Oregon destinations made by complainant at the combination rates does not show a holding out to afford through transportation to California or even to those particular destinations from the considered origins. That question was effectively settled in *Thompson v. United States*, 343 U. S. 548 and in *Denver & R. G. W. R. Co. v. Union P. Co., supra*. At page 559 in the former decision, the Court stated, "Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha". While at page 329 in the latter, a limited movement of traffic at the higher combination rates was held to be insufficient to establish routes.

Complaint does not assail the lawfulness *per se* of the particular segments of the combination rates applicable from the Montana origins to Portland or from that point to destinations in southern Oregon and California. Those rates were fixed by the Commission in *Grain and Grain Products, supra*. The failure to apply the joint rates over the routes in question is assailed as unlawful. In view of the conclusion that through routes do not exist it is necessary now to con-

sider whether the record here warrants the establishment of through routes and the prescription of joint rates.

Section 15(3) of the act grants the authority to establish such routes and rates provided that after full hearing it shall be determined that they are deemed to be necessary or desirable in the public interest. Section 15(4) modifies the foregoing section in that it provides, that, except as provided in section 3 of the act and except where one of the carriers is a water line, the Commission may not require a railroad to embrace in such route or routes substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route or routes, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or unless the Commission finds that the through route is needed in order to provide adequate, and more efficient or more economic transportation. The foregoing provisions are subject to the further limitation that the Commission in prescribing through routes should to the extent consist with the public interest and the restrictions indicated give reasonable preference to the carrier which originates the traffic.

The establishment of the routes sought would assertedly increase the source of supply for California flour buyers and also the markets for Montana wheat and thus be necessary and desirable in the public interest. In addition, the complainant urges that the term "public interest" refers as much to the shipper who uses the service as it does the public generally and has a direct relation to the adequacy of the transportation service. Consequently, the Commission is asked to

find that the new routes are necessary or desirable since the existing service is inadequate because the wheat may not be transported over routes via the mill at Milton-Freewater through to the considered destination at rates equal to those available to mills located at intermediate points on other routes such as Seattle and Portland. Reliance is placed on *Denver & R. G. W. Ry. Co. v. Union P. Ry. Co., supra* and *Pennsylvania R. Co. v. United States,* 323 U. S. 588 to support the contention that the routes should be established even though such action may result in requiring the Great Northern without its consent, to embrace in such route substantially less than the entire length of its railroad.

The Great Northern challenges any assertion that the existing routes are unreasonable long and inadequate. It directs attention to the fact that all of the present routes except one are shorter than the route sought; that the Milton-Freewater mill is located in the wheat producing area of Washington and Oregon from which joint rates are applicable with transit at the indicated mill to California markets; and that the route sought will, if established short-haul the Great Northern and result in considerable loss of revenues. The defendant further asserts that there is no basis for a finding under section 3(1) of the act since the Milton-Freewater mill participates to a much greater extent in the California markets than the other mills of the complainant which have available the joint rates.

The through routes sought would obviously be desirable to complainant. Their establishment would permit the mill at Milton-Freewater to sell flour in California in competition with other mills located on the existing routes without dependency on substituted billing. However, the practice of substituting or switching of billing is followed generally by

all millers in order to ship grain or milled products beyond the transit point at the most favorable freight charges. Whether the establishment of the routes sought are necessary or desirable by interests other than complainant is not so clearly shown. The complainant asserts that such routes would prove beneficial to the California commercial bakeries and to the wheat producers in Montana. But there is no showing in this record by representatives of those interest that the present routes are inadequate or that there is any need for the ones asked for in this proceeding. In *Chicago M. St. P. & P. R. Co. v. Spokane, P. & S. Ry. Co., supra,* the Commission in commenting on the testimony of shippers of lumber and lumber products that they desired unrestricted routing at competitive joint rates in connection with transit shipments, stated: "While this undoubtedly would be desirable from the shippers' viewpoint, there is no clear showing it would be in the public interest or that it is needed to provide adequate and more effective or more economic transportation".

But even if complainant's interest in having rates from and to the indicated areas via its Milton-Freewater mill the same as those via other mills, including three of its own, be considered sufficient to satisfy the statutory requirements of section 15(3), it is encumbent, before establishing such routes, to consider the limitations in section 15(4). The statute precludes the establishment of routes that short-haul the originating carrier unless the inclusion of its lines makes the through route unreasonable long as compared with another practicable through route which might otherwise be established; or the through route proposed is needed in order to provide adequate and more efficient or more economic transportation. The routes presently maintained from

the Montana origins on the Great Northern are not unreasonably long. All of them with one exception are shorter than the route sought. The one exception exceeds the proposed route by only 63 miles to either San Francisco or Los Angeles. The following table compares the distances of the present route with the ones sought to those cities from the representative Montana point of Chester.

Transit Station	*To*	*Distance Miles*	*Route*
Spokane	San Francisco	1435.1	GN-Chemult-SP
	Los Angeles	1808.1	" " "
Wenatchee	San Francisco	1701.0	GN-Portland-SP
	Los Angeles	2074.0	" " "
Portland	San Francisco	1565.4	GN-Spokane-SP&S-SP
	Los Angeles	1938.4	" " " "
Milton-Freewater	San Francisco	1638.9	GN-Spokane-UP
	San Francisco		Portland-SP
	Los Angeles	2011.9	GN-Spokane-UP
	Los Angeles		Portland-SP

The Great Northern estimates that based on current tonnage moving via the Milton-Freewater mill, the revenue loss it will sustain if the routes sought are established amounts to $36,000 annually. The revenue loss will be much greater if the other mills located on the Union Pacific in northern Oregon seek and obtain similar relief. The carrier estimates the revenue loss under such an eventuality at an additional $115,000. If California sales by such mills displaced any flour now sold by mills located on the Great Northern by virtue of obtaining the through routes and joint rates sought, then the revenue loss would be correspondingly greater. The complainant now has a flour mill capacity of more than 7,000 hundred weight at its three mills located on the through routes presently available on traffic destined to California and southern Oregon from Great Northern origins

in Montana. This capacity is about three times that of the Milton-Freewater mill. About 70 percent of the flour production of the latter mill has been shipped to California despite the absence of through routes and joint rates.

As indicated, recent decisions of the Commission and the Courts have set forth well defined principle of construction with respect to the provisions of sections 15(4). The following excerpt from *Denver & R. G. W. R. Co. v. Union P. T. Co., supra,* is illustrative:

> Section 15(4) empowers the Commission to consider the interests of shippers and the kind of services they get and need as well as the interests of carriers in determining whether additional routes should be established to provide "adequate" and "more economic" transportation service. We have held that in determining this question the Commission should look beyond the mere adequacy of the carrier's physical operations "to the broader public interest which embraces service to shippers and the rates they pay". *Pennsylvania R. Co. v. United States,* 323 U. S. 588, 591-593. The duty of the Commission, as we there stated, is to try to strike a fair balance in satisfying the needs of shippers, railroads, and the public. This of course calls for the Commission to exercise its informed judgment, having in mind its statutory obligation to develop coordinate and preserve an adequate national transportation system.

The expression "more efficient or more economic transportation" applies to both carriers as well as shipper interests. In striking the fair balance referred to by the Court it is essential to review the interest of both. In the circumstances here presented complainant's interest in obtaining the new routes

is outweighted by the adverse effect the short-haul routes would have on the Great Northern.

Initially, evidence was presented to show that the absence of the through routes and joint rates subjected complainant to the payment of unduly prejudicial rates. With the substitution of the present complainant (originally indicated to be unjustly preferred by rates and routes maintained by the Great Northern over routes via mills at Spokane, Wenatchee, and Portland) the issue under section 3(1) is not stressed. A finding of a violation under that section would appear to be precluded by the decision in *Union Pacific R. Co. v. United States*, 132 F. Supp. 72, in which the Court stated at page 80:

> * * * The prohibition of section 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entitles named and not to another. It does not apply to a situation such as this where the comparison or preferences or advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion.

The cited decision was affirmed in *Denver & R. G. W. R. Co. v. Union P. Co., supra*, but the Court stated, "* * * we have no occasion to consider contentions raised under sections 3(1) and 3(4)." However, the foregoing expression is favorably referred to by the Commission in *Chicago, M., St. P. & P. R. Co. v. Spokane P. & S. Ry. Co., supra*. It is also established that more than 70 percent of the production of the Milton-Freewater mill has been shipped to California during recent years. This compares with some 30 percent of the production of complainant's three other mills. The evi-

dence is not sufficient to support a finding of unlawfulness under section 3(1) of the act.

The Commission should find that rates on wheat and wheat products, in carloads, from origins on the lines of the defendant Great Northern Railway Company in Montana to destinations in Oregon south of Portland and in California over routes through Milton-Freewater, Ore., have not been shown to be unreasonable or unduly prejudicial. The Commission should further find that through routes and joint rates on wheat and wheat products in carloads from origins on the lines of the defendant Great Northern Railway Company to destinations in Oregon south of Portland and in California through Milton-Freewater, Ore., for transit are not shown to be necessary or desirable in the public interest. The complaint should be dismissed.

APPENDIX E

Applicable Provisions of the Interstate Commerce Act

Section 3(1) (49 U.S.C.A. Sec. 3(1)):

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(4) (49 U.S.C.A. Sec. 3(1)):

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to

the provisions of this part or any common carrier by water subject to part III.

Section 3(5) (49 U.S.C.A. Sec. 3(5)):

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected many agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 15(3) (49 U.S.C.A. Sec. 15(3)):

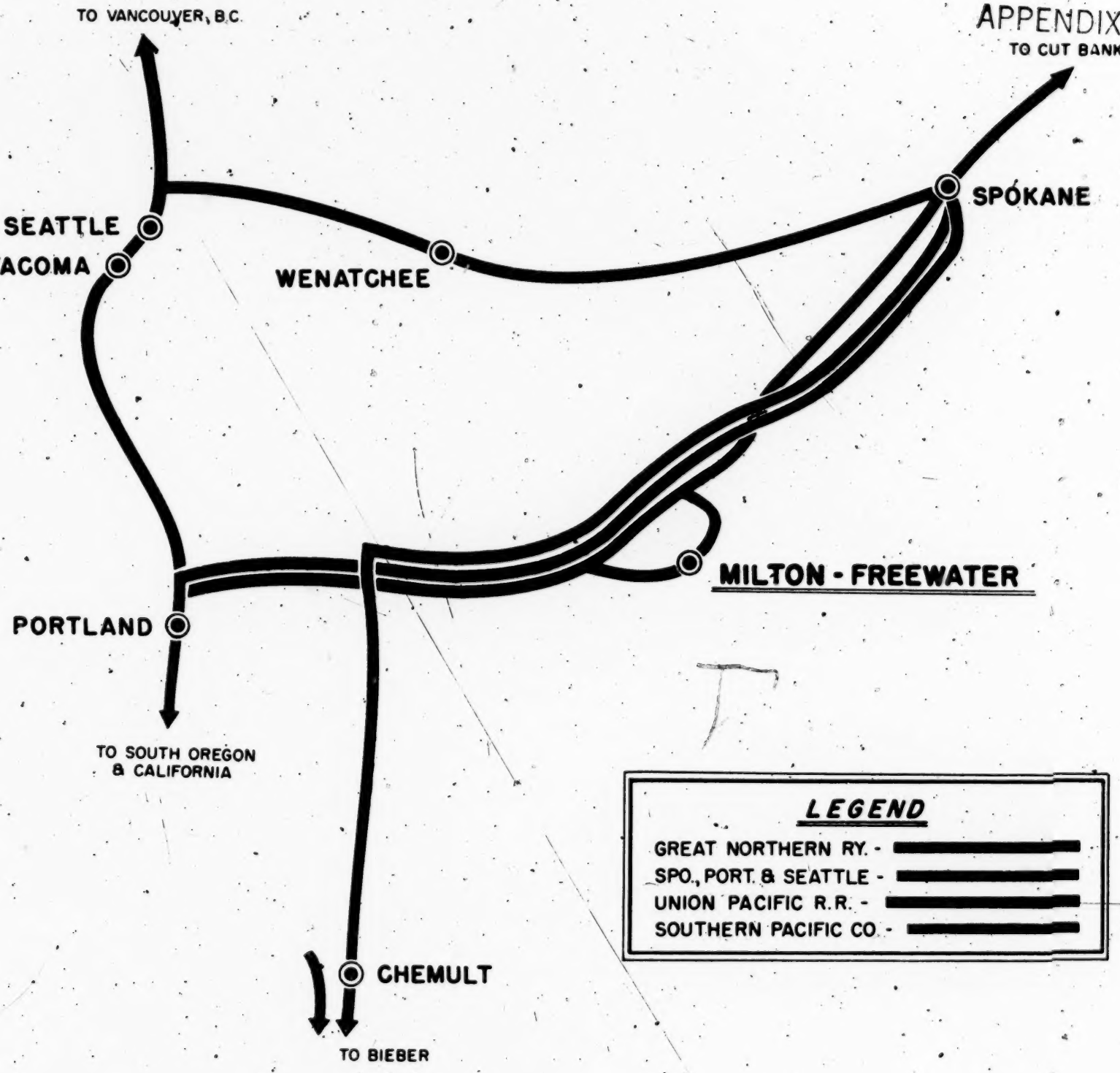
The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Section 15(4) (49 U.S.C.A. Sec. 15(4)):

In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of

any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation; *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

APPENDIX F


TO VANCOUVER, B.C.
TO CUT BANK
SEATTLE
TACOMA
WENATCHEE
SPOKANE
MILTON - FREEWATER
PORTLAND
TO SOUTH OREGON & CALIFORNIA
CHEMULT
TO BIEBER
LEGEND
GREAT NORTHERN RY. -
SPO., PORT. & SEATTLE -
UNION PACIFIC R.R. -
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December 1, 1958. This order, in a proceeding entitled *Preston-Shaffer Milling Co.* v. *Great Northern Railway Co., Union Pacific Railroad Co., Southern Pacific Co., and the Atchison, Topeka & Santa Fe Railway Co.* (Docket No. 32015), established through routes and joint rates for the transportation of wheat and wheat products in carloads from certain points in Montana to points in Oregon south of Portland and in California.[1]

On June 19, 1956, Preston-Shaffer Milling Co. filed a complaint with the Interstate Commerce Commission in which it alleged that the combination rates applicable on wheat and wheat products, in carloads from Cut Bank, Montana, and stations in Montana east and south thereof on the Great Northern Railway Co., to destinations in Oregon south of Portland and in California on the Southern Pacific and Santa Fe (over the route of the Great Northern to Spokane, Washington, the Union Pacific to Portland, and connections beyond), with transit at Milton-Freewater, were unjust and unreasonable in violation of § 1 of the Interstate Commerce Act, and unduly prejudicial to its mill at the said transit point, and unduly preferential of its competitors on other routes as to which joint rates apply, in violation of § 3(1) of the Act. The Commission was asked to prescribe just, reasonable and nonprejudicial joint rates for the future, and, if necessary, to require the establishment of

[1] Of the defendant railroads named in the complaint, only the appellant appeared at the administrative proceeding, and only the appellant has challenged the Commission's order.

through routes under the provisions of § 15 (3) and (4) of the Act. While the case was pending before the Commission, Preston-Shaffer sold its flour mill at Milton-Freewater to Centennial Mills, Inc., which was then substituted as the complainant.

As found by the Commission (Juris. St., pp. 38, *et seq.*) the mill at Milton-Freewater is used primarily in the milling of bakery flour for California commercial bakeries. Such flour is milled from hard spring wheat grown in Montana. About 79% of this wheat originates in the north and north central area adjacent to the lines of the Great Northern, and the remainder is produced along the lines of the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. In the 1955–56 crop year, Preston-Shaffer was able to obtain only about 9% of its requirements from Milwaukee origins. Rates on wheat and wheat products from Montana origins to Pacific Coast points were prescribed in *Grain and Grain Products,* 205 I.C.C. 301 and 215 I.C.C. 83. From the central and north central areas of Montana, a base rate, which, with the subsequent increases, is now 72 cents, was prescribed to Portland. It applies from Montana origins on the Great Northern to Portland, both over the Great Northern "long haul" through Spokane, Wenatchee, and Seattle and, through voluntary arrangement, also via a "through route" with joint rates over the route of the Great Northern to Spokane and the Union Pacific beyond, with transit at Milton-Freewater. However, when traffic originating at these Montana origins and transited at Milton-Freewater moves to destina-

tions in Oregon south of Portland and in California, the rates from Portland to the destinations are added to the 72-cent rate, resulting, for example, in a combination rate of $1.49 to San Francisco and $1.77 to Los Angeles.

The joint rate from the Montana origins to both San Francisco and Los Angeles over existing through routes is 30.5 and 58.5 cents less than the assailed combination rates to those points. The distances over the route via Milton-Freewater compare favorably with those over existing through routes, and no material difference in operating conditions over any of these routes is indicated.

Although the complainant operates mills located on routes over which the joint rates are applicable, it pressed the complaint because the Milton-Freewater mill is engaged largely in the milling of bread flour for the California bakeries. An important consideration in acquiring that mill was the fact that, unlike the complainant's other mills, it is equipped to load cars with bulk flour. Since the handling in bulk form is more economical, some of the large California bakeries are converting their operations to receive flour in that manner, and it is expected to become the common practice.

The Commission found that the marketing of flour is highly competitive, that hard spring wheat is essential to the milling of flour which meets the specifications of the commercial bakeries, and that the producing region of hard spring wheat has been receding to the Montana area served by the Great Northern.

(Juris. St., App. C, p. 49.) Although the complainant's predecessor had been able to remain competitive at points south of Portland and in California by resorting to the substitution of tonnage, the Commission concluded that the changing production picture is making that procedure most difficult. (Juris. St., App. C, p. 49.)

In the light of these facts, the Commission found that the failure of the defendant railroads to establish joint rates over the routes through Milton-Freewater, with transit at that point, is unduly prejudicial to the complainant's mill located there and unduly preferential of competitors' mills located on routes over which joint rates presently apply. It further found that it is necessary and desirable in the public interest that the unlawfulness thus found to exist be removed by the establishment of joint rates via Milton-Freewater, for transit at that point, which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes. (Juris. St., App. C, pp. 50–51.)

The three-judge district court unanimously dismissed the appellant's complaint to set aside the action of the Commission. (Juris. St., pp. 21–28.) In its memorandum decision, the district court stated (*Ibid.*, at p. 28):

> We have fully considered all of the arguments and contentions of the plaintiff and view them as being without merit. Our conclusion is that the Commission's order is based on adequate findings supported by substantial evidence in the record before it, and that the Com-

mission properly exercised its authority under the law and that its action was not unreasonable, arbitrary, or capricious.

ARGUMENT

1. The appellant argues that the Commission's power under § 15(3) of the Interstate Commerce Act (49 U.S.C. § 15(3)) to compel the establishment of through routes is limited by § 15(4), (49 U.S.C. § 15(4)) which affords carriers certain protection against being short-hauled. Since the Commission here did not make the finding, specified by § 15(4), that the proposed through route "is needed in order to provide adequate, and more efficient or more economic, transportation", it is contended that it could not order the through route between Montana and California and Southern Oregon via Milton-Freewater. But, by amendment to § 15(4), adopted in 1920, 41 Stat. 485–6, the section's limitations on Commission ordered short-hauling were expressly made inapplicable to cases involving "section 3" of the Act. Thus it is clear, as the court below concluded (Juris. St., p. 27), that where, as here, the Commission orders railroads to establish through routes in order to eliminate undue prejudice and preference in violation of § 3(1), the provisions of § 15(4), including the findings otherwise required, are not applicable. See *Baltimore & Ohio R. Co.* v. *United States,* 100 F. Supp. 1002, 1010 (S.D.N.Y., 1951); *Union Pacific R.R. Co.* v. *United States,* 132 F. Supp. 72, 80 (D. Neb., 1954), affirmed in part and reversed in part, on other grounds, *sub. nom. Denver and R.G.W. R.*

Co. v. Union Pacific R. Co., 351 U.S. 321. As the Court stated in the *Baltimore and Ohio* case, *supra:*

> To construe the parenthetical phrase as leaving the prohibition against short-hauling in effect despite a Commission finding of undue prejudice and preference under § 3 would be to deprive it of its apparent meaning. We cannot assume that was the intent of Congress in employing such language. The purpose of the parenthetical phrase seems clearly to permit the Commission to short-haul where it is necessary to avoid an undue prejudice or preference made unlawful by § 3. Hence, without more, the Commission was justified in making its short-haul order.[2]

The appellant suggests that the reference to "section 3" in the 1920 amendment to § 15(4) must be to "subdivisions of Section 3 other than subdivision (1)." (Juris. St., p. 12.) But not only is the controlling language not so limited, as it could easily have been if appellant's construction were valid, but nothing in the context of Section 3 or the legislative history of the amendment compels, or even suggests, such a construction. On the contrary, as the district

[2] Appellant argues (Juris. St., p. 13) that the holding in *Baltimore and Ohio* is *obiter dicta* since there was an alternative ground for the court's decision—the Commission in that case had gone on to make the findings specified by § 15(4) and substantial evidence supported these findings. But as the quotation above makes clear, the court found that the parenthetical reference to Section 3, "without more" justified a short-haul order where undue prejudice or preference was shown.

court concluded in the *Union Pacific* case, *supra* (at p. 80):

> If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered. * * *

2. The appellant also contends that since Milton-Freewater, the site of complainant's flour mill, is not located on its lines, but on those of the Union Pacific, there can be no violation of Section 3(1) of the Act which the Commission could order corrected under § 15(3). Relying upon the district court opinion in the *Union Pacific* case, *supra,* which in turn depended, on this point, on this Court's decision in *Central R.R. Co.* v. *United States,* 257 U.S. 247, the appellant argues the admitted disadvantages to Milton-Freewater cannot "be held in law attributable to appellant" (Juris. St., p. 10).[1] Under its theory a carrier, participating in joint rates between specified originating and destination points, may refuse to establish similar rates on other routes between the

[1] Actually, although Great Northern is the only railroad which objected to the Commission's order and although the transit point involved is on Union Pacific's line, all of the railroads involved both in the existing through routes and in the proposed new through route were parties to the proceeding and subject to the Commission's order. Specifically, Union Pacific, on whose line the transit point lies, is a part of one of the existing through routes and participates in the joint rates which were asserted to result in the discrimination. See Proposed Findings, Juris. St., p. 59.

same two points, found by the Commission to be "necessary or desirable in the public interest" in order to eliminate discrimination to a locality on such route, where the locality in question happens to be located on the line of another carrier.

The appellant's argument on this point does violence both to the language and purpose of Section 3(1) which encompasses every type of discrimination among shippers and localities. As this Court pointed out, with specific reference to Section 3(1) in *New York* v. *United States*, 331 U.S. 284, 296, "[t]he principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." The fact that Milton-Freewater is not on the lines of the appellant is not significant under the provisions of § 3(1) so long as appellant "in any respect whatsoever" "cause[s]" the unreasonable advantages to Milton-Freewater's competitor localities, or "subjects" Milton-Freewater to "undue or unreasonable prejudice or disadvantage." As this Court stated in *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 144 in upholding a requirement that carriers establish through routes and joint rates to Paducah no higher than rates to Cairo, though the carriers involved reached Paducah only over connecting lines:

> Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular

> locality is not confined to those whose rails enter it. * * *

See also *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 520 "(If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it.")

Appellant's reliance on the majority opinion of the district court in *Union Pacific R.R. Co.* v. *United States*,* *supra*, is clearly misplaced. That decision cited, as its sole authority for its position, the decision in *Central R.R. Co.* v. *United States*, 257 U.S. 247, 259–260. And this Court has later made clear in *New York* v. *United States*, 331 U.S. 284, the complete inapplicability of the *Central* case to the one at bar. Finding it unnecessary to pass on the contention (also available here) that a "common source of discrimination is * * * sufficient to sustain" an order to fix new rates, the Court stated (at pp. 342–3):

> * * * the principle announced in *Central R. Co.* v. *United States* and *Texas & Pacific R. Co.* v. *United States* [289 U.S. 627] is applicable

* Circuit Judge Johnsen, in dissenting, rejected the majority position that discrimination under § 3(1) cannot exist unless the complainant is located upon the lines of the carrier claimed to have committed the discrimination, finding this position untenable both on the language of the section and in the light of previous decisions on the Court. See 132 F. Supp. at pp. 87–88. The Supreme Court, affirming the Commission's order on other grounds, found "no occasion" to pass upon the point. See 351 U.S. 321 at p. 335.

only where the Commission is directing the carriers to remove the discrimination. Those cases hold that the Commission may not require carriers to do what they are powerless to perform. But the Court recognized in *Central R. Co.* v. *United States, supra,* p. 257, that where the Commission acts pursuant to § 1 to require carriers to establish, in connection with through routes and joint rates, reasonable rules and regulations, that problem is not involved. For then the Commission corrects the unlawful discriminatory practice in the case of each carrier by prescribing the just and reasonable rate or practice. The same is true where, as here, the Commission in order to eliminate territorial discriminations proceeds under § 15(1) to fix new reasonable rates. If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

While *New York* v. *United States* involved the prescription of rates under § 15(1), and the appellant makes much of this distinction (Juris. St., p. 14), there is nothing in the principle there announced that would not make it equally controlling where the Commission acts under § 15(3), and, in fact, the Court referred to § 15(3) in its discussion (p. 341). If, as was true in the *New York* case, § 3(1) can reach differentials between territorial rate levels involving many carriers which serve various points in such ter-

ritories, *a fortiori* it would appear to cover the preference and prejudice which results from the refusal of a single carrier to establish through routes and joint rates with another. Here the Commission has not ordered the Great Northern to do anything that it is powerless to perform but simply has directed it to enter into through routes and joint rates with the other railroads, who have not contested the Commission's action, between Montana and points south of Portland through Milton-Freewater just as it has already done between the same Montana points and Portland (see Juris. St., pp. 6–7).

3. Finally, the appellant contends that the evidence is insufficient to sustain the Commission's findings that complainant is unduly prejudiced in violation of § 3 (1) and that through routes are necessary and desirable in the public interest under § 15(3). (Juris. St., p. 16). However, the appellant does not specifically challenge any of the evidentiary findings of the Commission's unanimous report (Juris. St., pp. 38, *et seq.*), which the three-judge district court upheld as supported by substantial evidence in the record, considered as a whole (Juris. St., p. 26). Instead the appellant confines itself to certain general assertions. Thus, it contends that sales in California from the Milton-Freewater plant have increased despite the rate disparity, by the substitution of tonnage. However, the Commission carefully considered this fact and found that the changing production picture is making this procedure most difficult and has subjected the complainant to extra costs (Juris. St., pp. 44–45, 49–50). The appellant also points out that the present com-

plainant, Centennial Mills, Inc., has other mills which have available the joint rates and transit privileges which it seeks for its mill at Milton-Freewater (Juris. St., p. 16). This fact was also considered by the Commission, which noted that the mill at Milton-Freewater has certain facilities, not available at the other mills, which are advantageous in selling to California bakeries (Juris. St., p. 46). In any event, the plant at Milton-Freewater is not excluded from the protection of § 3(1) simply because the owner has mills at other points at which through routes and joint rates are available. Nor is the correction of the discrimination against the Milton-Freewater mill any less necessary or desirable because other competitors, who did not oppose the Commission's action here, might be unable to avail themselves of all the advantages accruing to the Milton-Freewater operation because of their less favorable location in relation to the originating points for wheat. Finally, the appellant points to its financial interest in maintaining the long-haul. Both the district court and the Commission fully considered this fact, and in rejecting the appellant's argument the court observed that "'self-interest of the carrier may not override the requirement of equality in rates.' *United States* v. *Illinois Central Ry. Co.*, 263 U.S. 515, 524" (Juris. St., p. 28).

Having found that the failure of the carriers to establish joint rates through Milton-Freewater with transit at that point, unduly prejudiced the mill located there and unduly preferred competing mills located on routes over which joint rates apply, the Commission properly found that it is necessary and desirable in the public interest that the unlawful dis-

crimination be removed by the establishment of joint rates over routes via Milton-Freewater, with transit at that point. Under the circumstances of this case, the § 3(1) violation could only be removed either (1) by permitting the defendants to disestablish the existing through routes and joint rates from Montana origins on the Great Northern to the destinations in Oregon south of Portland and in California, or (2) by the establishment of joint rates on the described traffic over routes through Milton-Freewater, with transit at that point. But the first alternative would have disrupted the route and joint rate structure that has been in effect for years (Juris. St., pp. 41–42). The second alternative would obviously serve the public interest since it would correct the unlawful discrimination and at the same time maintain the general grain rate structure.

Thus, while the appellant asserts that substantial evidence is lacking to support the order, it is, in reality, attacking the Commission's evaluation of the evidence in determining whether there was undue prejudice and preference, and whether it was in the public interest to require the establishment of the through route to correct the discrimination. These are matters particularly committed to the judgment of the Commission whose function, as guardian of the public interest, "is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit Navigation Co.*,

326 U.S. 236, 241; *New York* v. *United States, supra,* at p. 347.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal presents no substantial question and that the judgment of the district court should be affirmed.*

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SEPTEMBER 1959.

* We are authorized by counsel for the Appellee Centennial Mills, Inc. to state that it concurs in this motion.

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REPLY TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1950

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CENTENNIAL MILLS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY TO MOTION TO AFFIRM

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STATEMENT

Under the provisions of Rule 16, paragraph 3, appellant submits this reply to appellees' motion to affirm, which was received September 9, 1959. For convenience we reply first to the second point therein, and then to points 1 and 3.

ARGUMENT

1.

The motion misstates a pivotal argument of appellant. Appellant does not suggest, as appellees put it, that since Milton-Freewater is not located on appellant's lines there can be no violation of Section 3(1) (Motion to Affirm, p. 8). Rather, appellant points out, since it does not hold itself out either alone or in combination with other carriers to furnish transportation on the involved traffic via routes through Milton-Freewater from the origins to the destinations in issue, any disadvantage to complainant's mill at that point cannot be attributable to appellant in violation of Section 3(1).

This question goes beyond the fact that Milton-Freewater is not located on appellant's line. It also goes beyond the fact that the Union Pacific is the carrier which solely controls the granting or withholding of transit at that point.* It goes to the point that appellant simply does not provide, or hold itself out to provide, any service on the traffic in issue via routes through Milton-Freewater to the considered destinations. Any disadvantage to complainant's mill at Milton-Freewater is not, therefore, caused by appellant. "If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers." *Central R. R. Co. v. United States*, 257 U. S. 247, 259. And, if this were not so, the Commission would never have to establish through routes under Sections 15(3) and 15(4) in order to require a carrier

Central R.R. Co. v. United States, 257 U.S. 247, at 255.

to short-haul itself on traffic for transit. (Compare *Pennsylvania v. United States*, 323 U. S. 588, 590, involving the establishment of routes at the behest of an off-line transitor there said to be "deprived of its rightful competitive relation," wherein this Court stated that "the Commission's authority to grant relief" was "bottomed on §15(3) and (4) of the Interstate Commerce Act," not upon Section 3.)

Appellees' argument in essence is like that presented to this Court in *Thompson v. United States*, 343 U. S. 549, where it was said (559):

> "If there is no through carriage over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order."

This Court held in *Thompson* that the protection against short-hauling set forth in Section 15(4) was sufficiently substantial to prevent such a result.

New York v. United States, 331 U. S. 284, is cited by appellees to support their argument that there can be discrimination by a carrier against an off-line shipper which will be held in violation of Section 3(1). However, that case furnishes appellees with no support for the additional argument, which must be substantiated to sustain their motion, that there can be such discrimination in violation of the statute merely from a carrier's nonparticipation with another carrier in a through route which would require short-hauling. In *New York v. United States*, through routes were already

in existence to and from both the points there found to be preferred and there found to be prejudiced, such routes were participated in by the carriers found to be practicing the discrimination, and in the order there under review the Commission, in ordering the discrimination removed, simply exercised its power under Section 15(1) "to establish, in connection with through routes * * * new reasonable rates" (*id.*, p. 342). In other words, it made a rate order, not an order establishing new through routes.

St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136, and *United States v. Illinois Central R. Co.*, 263 U. S. 515, 520, likewise relied upon by appellees in this connection, are similarly distinguishable. In the *St. Louis S. W. Ry. Co.* case it appeared that the appellant rail carriers reached Cairo, the preferred point, by their own rails while contemporaneously, the Court said, such carriers "*bill traffic * * * through to Paducah* [the prejudiced point] *in connection with the Illinois Central*, thus reaching Paducah, although not on their own rails" (emphasis supplied, 245 U. S. 144). No such through billing practice is present here. On the contrary, in the instant case through routes are not in existence and the order assailed would establish them (Motion to Affirm, p. 2; Juris. Statement, pp. 47-48). Similarly, in the other case relied upon, *United States v. Illinois Central R. Co.*, through routes from both the preferred and prejudiced points were already in existence and transportation thereover was performed "as the result of an arrangement between the carriers" (*id.* at 520 and 525).

Neither the establishment of through routes nor short-hauling, both of which are in issue here, was in question in any of the cases cited by appellees on this point.

Appellees also urge (Motion to Affirm, pp. 6-7) that since the words "except as provided in Section 3," which are contained in Section 15(4), are literally broad enough to embrace subsection (1) as well as the other subsections of Section 3, a valid finding that a carrier is in violation of Section 3(1) deprives such carrier of the protection against short-hauling afforded by Section 15(4).

Assuming, *arguendo*, that the Commission had made a valid finding under Section 3(1), appellees' contention that it would deprive appellant of the protection afforded by Section 15(4) is not sound. There is nothing in subdivision (1) of Section 3 which provides or suggests that that subsection relates to the denial or establishment of through routes. On the contrary, the proviso at the conclusion of Section 3(1) prohibits the very construction which appellees urge. That proviso reads:

> "This paragraph shall not be construed to apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description."

In *Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, where the Commission had under consideration the question whether the routing restrictions of certain railroads were discriminatory and prejudicial to shippers desiring to utilize the lines of complainant, in violation of Section 3(1), it said with respect to the proviso above quoted (at 220):

> "The proviso recently added to that paragraph makes it inapplicable to such violations and leaves them to be dealt with under section 3(4)."

Since subsection (4) of Section 3 prohibits carriers from discriminating in "the interchange of traffic between their respective lines and connecting lines," i.e., since that subsection prohibits discriminatory routing, the phrase contained in Section 15(4) reading "except as provided in section 3" has definite meaning when applied to subsection (4) of Section 3. The Commission has specifically held that a violation of that section deprives a railroad of the protection against short-hauling afforded by Section 15(4). *Denver & R. G. W. R. Co. v. Union Pacific R. Co.*, 287 U. S. 611, 658-659, 660, sustained on other grounds in *Denver & R. G. W. R. Co. v. Union Pacific R. Co.*, 351 U. S. 321.

In the instant case, of course, Section 3(4) does not operate as a limitation upon the protection against short-hauling available to appellant because it was not contended here—nor has the Commission found—that appellant is guilty of unlawful discrimination against the traffic of the Union Pacific in its interchange arrangements at Spokane.

3.

The sufficiency of the evidence to sustain the Commission's findings under Sections 3(4) and 15(4) cannot be determined merely by a reference to the Commission's evidentiary findings, as appellees' motion implies (p. 12 *et seq.*). Many of the Commission's evidentiary findings are incorrect or incomplete. For example, the statement at page 3 of the motion that "in the 1955-56 crop year, Preston-Shaffer was able to obtain only about 9% of its requirements from Milwaukee origins in Montana," which in turn is taken from the Commission's report (Juris. Statement, p. 41), is grossly

misleading. The testimony supporting complainant before the Commission showed that in the 1955-56 crop year there were "especially heavy" rains "throughout the central third of Montana," which is reached by the Milwaukee as well as by appellant. These rains "just seemed to wash the quality out of all the wheat produced in that historical area of origin," and it became "necessary for complainant mill * * * along with the other Pacific mills to go into the northeastern portion of the state [not reached by the Milwaukee] to originate nearly all of the spring wheat required" (Commission record, pp. 22 and 75). No such phenomenon was present in earlier years nor in the following year, commencing June 30, 1956, which was referred to at the hearing as "the present crop year" (*id.*). The conclusion is inescapable that normally the Milton-Freewater mill obtains and will continue to obtain much more than 9 percent of its supply from origins on the Milwaukee and that the "production picture" is not "changing" to the extent the Commission apparently supposed (Juris. Statement, p. 49).

In its jurisdictional statement (pp. 16 and 17) appellant points out that the mills of appellee Centennial Mills, Inc., at the points alleged to be preferred over Milton-Freewater comprise 82 percent of its total milling capacity as against 18 percent of appellee's capacity at Milton-Freewater; that the mills at these so-called preferred points sell but 30 percent of their output in California as contrasted with the mill at Milton-Freewater, as to which California sales reach 70 percent of production; and that California sales from Milton-Freewater are increasing. These undisputed facts, which clearly show an absence of undue prejudice, together with other evidentiary matters which cannot be adequately presented to the Court at this stage, will be brought out on

brief to demonstrate that the Section 3(1) and 15(3) findings are completely unsupported.

CONCLUSION

To the extent that matters mentioned in the motion to affirm are not fully answered in this reply, we refer the Court to our jurisdictional statement. For the reasons therein stated and those above set forth, it is submitted that the motion to affirm must be denied.

Respectfully submitted,

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Dated September 25, 1959.

PROOF OF SERVICE

I, LOUIS E. TORINUS, JR., one of the attorneys for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25th day of September, 1959, I served copies of the foregoing Reply to Motion to Affirm on the adverse parties, as follows:

1. On appellee United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable William P. Rogers
Attorney General of the United States
Department of Justice,
Washington 25, D. C.

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Mr. Victor R. Hanson
Assistant Attorney General of the United States
Department of Justice
Washington 25, D. C

Mr. John H. D. Wigger
Attorney
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Mr. Fallon Kelly
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2. On appellee Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Mr. Robert W. Ginnane
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Mr. Francis A. Silver
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On appellee Centennial Mills, Inc., by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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